United States Court of Appeals for the Second Circuit



APPENDIX

74-1699 74-1706%

In The

74-1661

United States Court of Appeals

For The Second Circuit

FABRIZIO & MARTIN INCORPORATED,

Plaintiff-Appellee-Appellant,

VS.

BOARD OF EDUCATION CENTRAL SCHOOL DISTRICT NO. 2 OF THE TOWNS OF BEDFORD, NEW CASTLE, NORTH CASTLE AND POUND RIDGE, MARS ASSOCIATES, INC., and NORMEL CONSTRUCTION CORP. OF NEW ROCHELLE, a joint venture,

Defendants,

THE BOARD OF EDUCATION CENTRAL SCHOOL DISTRICT NO. 2 OF THE TOWNS OF BEDFORD, NEW CASTLE, NORTH CASTLE AND POUND RIDGE,

Defendants-Appellants-Appellees,

AETNA CASUALTY & SURETY CO., Additional Defendant on the Counterclaim of Defendant Board of Education,

Defendant-Appellee-Appellant.

On Appeal from a Judgment of the United States District Court for the Southern District

APPENDIX

Volume I, pp. 1 - 270

LOUIS E. YAVNER

Attorney for Board of Education 60 East 42nd Street New York, New York 10017 (212) YU6-2255 PAGINATION AS IN ORIGINAL COPY

TABLE OF CONTENTS

Appendix

	Page
Docket Entries 66 Civ. 2935	18
Docket Entries 68 Civ. 1162	7a
Plaintiff, Fabrizio and Martin, Inc. Complaint (Filed September 13, 1966)	10a
Schedule "A" Annexed to Foregoing Complaint	18a
Defendant's Answer (Filed August 11, 1967)	22a
Plaintiff's Reply to Counterclaim (Dated August 26, 1968)	38a
Plaintiff Board of Education's Complaint (Dated March 10, 1969)	45a
Defendant's Answer	56a
Opinion of McLean, J. (Dated May 5, 1967)	70a
Opinion of McLean, J. (Dated May 5, 1967)	73a
Opinion of McLean, J. (Dated July 6, 1967)	80a
Order and Decision of Ryan, J. (Dated October 1, 1968)	96a

	Page
Opinion of United States Court of Appeals	119a
Pre-Trial Order (Dated October 17, 1972).	130a
Amendment to Pre-Trial Order Annexed to Foregoing	163a
Exhibit "1" - Proposed Contentions and Issues Annexed to Foregoing Pre-Trial Order	167a
Exhibit "2" - Proposed Additions Annexed to Foregoing Pre-Trial Order .	172a
Transcript of Proceedings Before Carter, J. March 1,1973	176a
Transcript of Proceedings March 2, 1973	313a
Transcript of Proceedings March 5, 1973	475a
Transcript of Proceedings March 6, 1973	664a
Transcript of Proceedings March 7, 1973	8 69 a
Exhibit D - 7 - Standard Form of Agreement	1025a
Exhibit D-31 - Supplemental Agreement Dated March 23, 1965	1036a

	Page
Exhibit D-98 - Analysis of Completion	1051a
Findings and Opinion of District Court Dated March 27, 1974	
Judgment (Filed March 28, 1974)	1074a
Extract of the Minutes Annexed to Foregoing Judgment	
Witnesses	
Robert F. Crane: Direct Cross Redirect Recross Charles W. Fowler:	177a 259a , 747a 793a
Direct Cross Redirect Recross	297a 601a 656a 705a
Anthony C. Sabella: Direct Cross	581a 594a
Clifford Q. Christensen: Direct	822a 825a

																			Page
Thomas Direct	Ρ.	M	lo	yn	a:														826a
Richard I		P	ra	tt	:														
Direct																			829a
Cross																			839a
Redire	ct																		843a
Recros	s	•																	844a
Harold W																			
Direct		•	•	•	•			•	•		•	•		•		•			845a
Cross		•	•	•	•	•	•	•	•		•			•					850a
Redirec	35	•	•	•	•	•	•	•	•	•	•		•			•			852a
John Wile Direct																			853a
Michael J	. I																		
Direct		•	•	•	•	•	•	•	•	•	•	•	•	•	•		8	55a,	892a
Resume Cross	a	•	•	•	•	•	•	•	•	•	•	•	•	•	•		•		888a
Cross																	9	149	9479
Redirec	ı	•	•	•	•	•	•	•	•	•	•	•	•	•	•	•	•		949a
Max E. G																			
Direct	•	•	•	•	•	•	•	•	•	•									870a
Cross	•	•	•	•	•	•	•	•		•	•	•							875a
Oliver Kir																			
Direct	•	•	•	•	•	•	•	•	•	•	•			•					922a
Vincent Fa																			
Direct	•	•	•	•	•	•	•	•	•	•	•	•	•	•					968a

																	Page
Cross .																	999a
Redirect		•	•	•	•	•	•	•	•	•	•	•	•	•	•	•	1005a
Joseph Brai	nd	es	:														
Direct .																	10119

DOCKET ENTRIES 86 CAV 2939

2-9-72 - THIS ACTION CONSOLIDATED WITH 68 CIV 1162 FOR TRIAL ONLY.

CIVIL DOCKET 66 CTV 2935

66 CIV 2935

UNITED STATES DISTRICT COURT

C. Form No. 106 Rev.

JUDGE CARTER



LE OF CASE				A:	TTORNI	eys .		
		F	or plaintiff:					
CORPORATED	414 5127			00 F				
2 175 70 115	- to - 1		50 Broadway.	N Y	57.	71	1 11	
		- 1	42	2		-	4	
N CENTRAL SCHOOL	Of Diameter			7	45	4		
F BEDFORD NEW	CASTLE NORTH	. 5.	-20-74: Weins	tein.	Krul	ewi+-	P. 14-4	
E.	CASILE, NUKIH		114 6	olden	H411	CA I	e weln	DF
AMD		-				D6. E	Tragebo	ort, Co
ORP. OF NEW ROC	CHELLE. A	1						* 200
		#						
Del fa.								
W 00								***
dettemas dear								14.
ounterclein of	on the	-						
-9-72)	RDucation	4						
7 151	22-ucation	-					-	1 000
		#						
		Fa	- 1.6					1.1
								W 1 0
		Loui	s E. Iavner	YU 6-	2255)	the per	1000
		00 E	ast, 42nd St.	NYC	10	2017	37	000
		-					P. Sale	21217
		1						12 Bur 11
								111
								100 100 100
								-1-19
								407
								1
								1 3
								. " 15
								A
								60
COSTS		DATE	NAME OR	R	EC.	11		
Clerk		1.1.	DOST.	-			DISB.	19
- CITA		9/0/46	J.G. denes	13	1 -		1	- 6
		16/66	48 The	#	1	10	-	
Marchal		10-31-68	HYNES	5	-	1/3	·	
- Inai Silai		11-1-18	USTRES			5	-	
Doolest (0474	MUNICA	5	1		17	-
Docket 1ee		Billy	THIS	-		15	-	
Witness		16/2	Precion	1	-	1		14
witness fees		17/20	Typan	¥	1	1		
-		2/2/20	Leid	-	-	~		
Depositions		11/24	14100		-	-		- 1
-	/	1	ALC:		-	/		- 2
1 1000		-				-		
		The state of the s		SHE TO SHEET STORY				
-		-+					;	1 19
	E. AND ORP. OF NEW ROC Defts' Y Co. dditional deft	COSTS COSTS COSTS COSTS COSTS CORNERS (Sees)	COSTS CO	COSTS CO	For plaintiff: Leslie A. Hynes, E 50 Broadway, N. Y. 422-c SN CENTRAL SCHOOL DISTRICT F BEDFORD, NEW CASTLE, NORTH E. AND ORP. OF NEW ROCHELLE, A Defts' TO CO. Idditional deft on the Counterclaim of deft Board of EDucation For defendant: Louis E. Yavner (YU 6- 60 East, 42nd St., NYC Clerk Marshal Docket fee Witness fees For plaintiff: Leslie A. Hynes, E 50 Broadway, N. Y. 422-c 50 Broadway, N. Y. 60 Broadway, N. Y. 60 Broadway, N. Y. 61 Clerk 60 Fast 42 Clerk 60 Fast 61 Clerk 60 Fast 62 Clerk	For plaintiff: Leslie A. Hynes, Esq. 50 Broadway, N. Y. 422 - 7 42 NO CENTRAL SCHOOL DISTRICT F BEDFORD, NEW CASTLE, NORTH AND ORP, OF NEW ROCHELLE, A Defts TOO, dddtional deft on the counterclaim of deft Board of -9-72) For defendant: Louis E, Tayner (TU 6-2255) 60 East, 12nd St., NTC Clerk Marshal Docket fee Witness fees	Leslie A. Hynes, Esq. 50 Broadway, N. Y. 422-744 No. CENTRAL SCHOOL DISTRICT F BEDFORD, NEW CASTLE, NORTH E. AND ORP, OF NEW ROCHELLE, A Defts To Co. deditional deft on the counterclaim of deft Board of -9-72) For defendant: Louis E. Yavner (IU 6-2255) 60 East, 42nd St., NYC 10017 Clerk Marshal Docket fee Witness fees Leslie A. Hynes, Esq. 50 Broadway, N. Y. 422-744 Sept. Solutional Mainstein, Krulewite 11-14 Golden Hill St. II 11-14	CORPORATED For plaintiff: Leglie A. Hynes, Esq. 50 Broadway, N. Y. 422-7744 FREDFORD, NEW CASTLE, NORTH E. AND ORP, OF NEW ROCHELLE, A Defts For defendant: Louis E., Tawner (YU 6-2255) 60 East, 42nd St., NYC 10017 Costs DATE RECEIPT NO. REC. DISB. Clerk Marshal Docket fee Witness fees

JUDGT CARTER

Served Board of Education, Central Sch. Dist. "2-9-11-66 Oct. 19-66 Filed stip. & order extending defts' time to answer to 10-19-66-Cooper, J. Oct. 19-66 Filed stip. & order extending defts' time to answer to 11-18-66-MacMahon, J. Nov. 10-66 Filed stip. & order extending defts' time to answer to 11-25-66-Croake, J. Nov. 18-66 Filed stip. & order extending defts' time to answer to 11-25-66-Croake, J. Nov. 23-66 Filed stip. & order extending defts' time to answer to 11-25-66-Croake, J. Nov. 29-66 Filed defts' affdvt. & show cause order to "ay all proceedings, etcret. 12-6 Nov. 29-66 Filed defts' memorandum in support of show cause order Dec. 5-66 Filed stip. adjourning defts' motion to 12-20-66 Dec. 19-66 Filed stip. adjourning defts' motion to 12-20-66 Dec. 19-67 Filed affdvt. & notice of motion for leave to intervene Austen E.Colpate & P.M. Colpate as deftsret. 2-11-67 Isa. 23-67 Filed stipulation adjourning motion now ret. 1/4/67 to 2/7/67. Bec. 6-67 Filed pltff's affdvt. & noticeof motion to amend complaint-ret. 2-21-67 Filed. 15-67 Filed memorandum in support of motion to intervene 10-67 Filed stip. adjourning motion to in evene to 2-21-67 Filed stip. adjourning motion to in evene to 2-21-67 Filed 15-67 Filed memorandum in support of motion to intervene 10-67 Filed stip. adjourning motion to intervene 10-68 Filed stip. adjourning motion to intervene 10-69 Filed affdvt. & noticeof motion to intervene 10-69 Filed stip. adjourning motion to intervene 10-60 Filed filed stip. adjourning motion to intervene 10-60 Filed filed stip. adjourning motion to intervene 10-60 Filed stip. adjourning motion to intervene 10-60 Filed memorandum of law (filed in court) 10-60 Filed affdvt. of Edgar J. Van Allsburg in opposition to motions to intervene & declaratory judgment (filed in court) 10-60 Filed affdvt. of Israel Machtey in opposition (filed in court) 10-60 Filed affdvt. of Israel Machtey in opposition (filed in court) 10-60 Filed affdvt. of Vincent Fabrizio 10-60 Filed memo endorsed on m	851
Sep. 23-66 Filed summons & return, served Mars-Normel, a Joint venture, etc9-11-66; served Board of Education, Central Sch. Dist. "2-9-11-66 Oct. 5-66 Filed stip. & order extending defts' time to answer to 10-19-66-Cooper, J. Nov. 10-66 Filed stip. & order extending defts' time to answer to 11-1-66-MacMahon, J. Nov. 10-66 Filed stip. & order extending defts' time to answer to 11-25-66-Croake, J. Nov. 10-66 Filed stip. & order extending defts' time to answer to 11-36-66-Croake, J. Nov. 23-66 Filed stip. & order extending defts' time to answer to 11-35-66-Croake, J. Nov. 29-66 Filed defts' affdvt. & show cause order to "tay all proceedings, etcret. 12-6. Nov. 29-66 Filed defts' memorandum in support of show cause order Dec. 5-66 Filed stip. adjourning defts' motion to 12-20-66 Dec. 19-66 Filed stip. adjourning defts' motion to 1-21-67 Jan. 23-67 Filed affdvt. & notice of motion for leave to intervene Austen E.Colpate & P.M. Colpate as deftsret. 2-11-67 Jan. 23-67 Filed stipulation adjourning motion now ret. 1/Ai/67 to 2/7/67. Dec. 5-66 Filed stipulation adjourning motion now ret. 1/Ai/67 to 2/7/67. Dec. 5-67 Filed memorandum in support of motion to amend complaint-ret. 2-21-67 Jan. 23-67 Filed memorandum in support of motion to intervene Dec. 5-66 Filed stip. adjourning motion to intervene Dec. 5-67 Filed memorandum in support of motion to intervene Dec. 5-67 Filed affdvt. of Edgar J. Van Allsburg in opposition to motions to intervene & declaratory judgment (filed in court) Dec. 5-67 Filed affdvt. of Israel Machtey in opposition (filed in court) Dec. 5-67 Filed affdvt. of Israel Machtey in opposition (filed in court) Dec. 5-67 Filed affdvt. of Israel Machtey in opposition (filed in court) Dec. 5-67 Filed affdvt. of Israel Machtey in opposition (filed in court) Dec. 5-67 Filed affdvt. of Israel Machtey in opposition (filed in court) Dec. 5-67 Filed affdvt. of Israel Machtey in opposition in court. Dec. 5-67 Filed affdvt. of Israel Machtey in opposition in court. Dec. 5-67 Filed aff	851
Served Board of Education, Central Sch.Dist. "2-9-1166 Siled stip. & order extending defts' time to answer to 11-166-MacMahon, J. Nov. 10-66 Filed stip. & order extending defts' time to answer to 11-166-MacMahon, J. Nov. 10-66 Filed stip. & order extending defts' time to answer to 11-18-66-Croake, J. Nov. 18-66 Filed stip. & order extending defts' time to answer to 11-25-66-Croake, J. Nov. 23-66 Filed stip. & order extending defts' time to answer to 11-30-66-Ponsal, J. Nov. 29-66 Filed stip. & order extending defts' time to answer to 11-30-66-Ponsal, J. Nov. 29-66 Filed defts' affdvt. & show cause order to "ay all proceedings, etcret. 12-6. Dec. 5-66 Filed stip. adjourning defts' motion to 12-20-66. Dec. 19-66 Filed stip. adjourning defts' motion to 12-20-66. Dec. 19-66 Filed stip. adjourning defts' motion to 12-18-67. Jan. 23-67 Filed affdvt. & notice of motion for leave to intervene Austen B.Colpate & P.M. Colpate as deftsret. 2-11-67. Jan. 23-67 Filed stipulation adjourning motion now ret. 1/41/67 to 2/7/67. 28-23-67 Filed stipulation adjourning motion now ret. 1/41/67 to 2/7/67. 29-66 Filed stipulation adjourning motion to amend complaint-ret. 2-21-67. 10-67 Filed memorandum in support of motion to amend complaint-ret. 2-21-67. 10-67 Filed memorandum in support of motion to intervene 10-67 Filed memorandum in support of motion to intervene 10-68 Filed memorandum in support of motion to intervene 10-69 Filed affdvt. of Edgar J. Van Allsburg in opposition to motions to intervene & declaratory judgment (filed in court) 10-7 Filed affdvt. of Israel Machtey in opposition (filed in court) 10-7 Filed affdvt. of Israel Machtey in opposition (filed in court) 10-7 Filed affdvt. of Israel Machtey in opposition (filed in court) 10-7 Filed affdvt. of Israel Machtey in opposition (filed in court) 10-7 Filed affdvt. of Israel Machtey in opposition (filed affdvt. of Israel Machtey in opposition (filed in court) 10-7 Filed affdvt. of Israel Machtey in opposition (filed in court) 10-7 Fil	851
Oct. 19-66 Filed stip. & order extending defts' time to answer to 10-19-66-Cooper, J. Nov. 10-66 Filed stip. & order extending defts' time to answer to 11-16-67-MacMahon, J. Nov. 10-66 Filed stip. & order extending defts' time to answer to 11-36-66-Croake, J. Nov. 18-66 Filed stip. & order extending defts' time to answer to 11-30-66-Fonsal, J. Nov. 23-66 Filed stip. & order extending defts' time to answer to 11-30-66-Fonsal, J. Nov. 29-66 Filed defts' memorandum in support of show cause order Dec. 19-66 Filed stip. adjourning defts' motion to 12-20-66 Dec. 5-66 Filed stip. adjourning defts' motion to 12-20-66 Dec. 19-66 Filed stip. adjourning defts' motion to 12-20-66 Dec. 19-67 Filed affdvt. & notice of motion for leave to intervene Austen B.Colpate & P.M. Colpate as deftsret. 2-11-67 Fam. 23-67 Filed stip. adjourning motion now ret. 1/11/67 to 2/7/67. Dec. 19-66 Filed stip. adjourning motion now ret. 1/11/67 to 2/7/67. Dec. 19-67 Filed pltff's affdvt. & notice of motion to amend complaint-ret. 2-21-67 Dec. 19-67 Filed pltff's affdvt. & notice of motion to intervene 10-68 Filed stip. adjourning motion to intervene 10-69 Filed stip. adjourning motion to intervene 10-69 Filed memorandum in support of motion to intervene 10-60 Filed stip. adjourning motion to intervene 10-60 Filed stip. adjourning motion to intervene 10-61 Filed defts' memorandum of law (filed in court) 10-62 Filed affdvt. of Edgar J. Van Allsburg in opposition to motions to intervene & declaratory judgment (filed in court) 10-65 Filed affdvt. of Israel Machtey in opposition (filed in court) 10-67 Filed affdvt. of Israel Machtey in opposition (filed in court) 10-68 21-67 Filed affdvt. of Israel Machtey in opposition (filed in court) 10-69 Filed affdvt. of Israel Machtey in opposition (filed in court) 10-7 Filed affdvt. of Israel Machtey in opposition (filed in court) 10-7 Filed affdvt. of Israel Machtey in opposition (filed in court) 10-7 Filed affdvt. of Israel Machtey in opposition to motion for leave to amend its	851
Nov. 10-66 Filed stip. & order extending defts' time to answer to 11-16-66-MacMahon, J. Nov. 18-66 Filed stip. & order extending defts' time to answer to 11-16-66-Croake, J. Nov. 23-66 Filed stip. & order extending defts' time to answer to 11-30-66-Ponsal, J. Nov. 29-66 Filed defts' affdvt. & show cause order to "ay all proceedings, etcret. 12-6. Nov. 29-66 Filed defts' memorandum in support of show cause order Dec. 5-66 Filed stip. adjourning defts' motion to 12-20-66 Dec. 19-66 Filed stip. adjourning defts' motion to 12-20-66 Dec. 19-66 Filed stip. adjourning defts' motion to 12-21-67 Jan. 23-67 Filed affdvt. & notice of motion for leave to intervene Austen B.Colpate & P.M. Colpate as deftsret. 2-11-67 Ban. 23-67 Filed stipulation adjourning motion now ret. 1/d1/67 to 2/7/67. Ban. 23-67 Filed stipulation adjourning motion to amend complaint-ret. 2-21-67 Ban. 23-67 Filed memorandum in support of motion to intervene 10-67 Filed memorandum in support of motion to intervene 11-15-67 Filed memorandum in support of motion to intervene 12-67 Filed memorandum of law (filed in court) 13-21-67 Filed affdvt. of Edgar J. Van Allsburg in opposition to motions to intervene & declaratory judgment (filed in court) 13-21-67 Filed affdvt. of Israel Machtey in opposition (filed in court) 13-21-67 Filed affdvt. of Israel Machtey in opposition (filed in court) 14-25-67 Filed affdvt. of Israel Machtey in opposition (filed in court) 14-25-67 Filed affdvt. of Israel Machtey in opposition (filed in court) 15-67 Filed affdvt. of Israel Machtey in opposition (filed in court) 15-67 Filed affdvt. of Israel Machtey in opposition (filed in court) 15-67 Filed affdvt. of Israel Machtey in opposition (filed in court) 15-67 Filed affdvt. of Israel Machtey in opposition (filed in court) 15-67 Filed affdvt. of Israel Machtey in opposition (filed in court) 15-67 Filed affdvt. of Israel Machtey in opposition (filed in court) 15-67 Filed affdvt. of Israel Machtey in opposition (filed in court) 15-67 Filed opposition	\$ 5 T
Nov. 18-66 Filed stip. & order extending defts' time to answer to 11-18-66-Croake, J. Nov. 23-66 Filed stip. & order extending defts' time to answer to 11-30-66-Ponsal, J. Nov. 29-66 Filed defts' affdvt. & show cause order to "ay all proceedings, etcret. 12-6. Nov. 29-66 Filed defts' memorandum in support of show cause order Dec. 5-66 Filed stip. adjourning defts' motion to 12-20-67 Dec. 19-66 Filed stip. adjourning defts' motion to 12-20-67 Jan. 23-67 Filed affdvt. & notice of motion for leave to intervene Austen E.Colpate & P.M. Colpate as deftsret. 2-11-67 Jan. 23-67 Filed stipulation adjourning motion now ret. 1/41/67 to 2/7/67. Jan. 23-67 Filed stipulation adjourning motion now ret. 1/41/67 to 2/7/67. Jan. 23-67 Filed stipulation adjourning motion to amend complaint-ret. 2-21-67 Jan. 23-67 Filed pltff's affdvt. & notice of motion to amend complaint-ret. 2-21-67 Jan. 23-67 Filed memorandum in support of notion to intervene to 2-21-67 Jan. 23-67 Filed memorandum in support of notion to intervene to 2-21-67 Jan. 23-67 Filed memorandum in support of notion to intervene to 2-21-67 Jan. 23-67 Filed memorandum in support of notion to intervene to 2-21-67 Jan. 23-67 Filed memorandum in support of notion to intervene to 2-21-67 Jan. 23-67 Filed memorandum of law (filed in court) Jan. 23-67 Filed affdvt. of Edgar J. Van Allsburg in opposition to motions to intervene & declaratory judgment (filed in court) Jan. 23-67 Filed affdvt. of Israel Machtey in opposition (filed in court) Jan. 23-67 Filed reply brief for applicants for intervention Jan. 23-67 Filed affdvt. of Israel Machtey Jan. 23-67 Filed affdvt. of Vincent Fabrizio Jan. 23-67 Filed affdvt. of Vincent Fabrizio Jan. 23-67 Filed Opinion #33.170-Accordingly by separate memorandum filed in court. Jan. 23-67 Filed Opinion #33.170-Accordingly by separate memorandum filed in court.	\$ 5 T
Nov. 16-56 Filed stip. & order extending defts' time to answer to 11-25-66-Croake, J. Nov. 29-66 Filed defts' affdvt. & show cause order to "ay all proceedings, etcret. 12-60. Nov. 29-66 Filed defts' memorandum in support of show cause order Dec. 5-66 Filed stip. adjourning defts' motion to 12-20-66 Dec. 19-66 Filed stip. adjourning defts' motion to 12-20-66 Dec. 19-66 Filed stip. adjourning defts' motion to 1-21-67 Jan. 23-67 Filed affdvt. & notice of motion for leave to intervene Austen B.Colpate & P.M. Colpate as deftsret. 2-11-67 Jan. 23-67 Filed stipulation adjourning motion now ret. 1/Al/67 to 2/7/67. Jan. 23-67 Filed stipulation adjourning motion now ret. 1/Al/67 to 2/7/67. Jan. 23-67 Filed stipulation adjourning motion to amend complaint-ret. 2-21-67 Jan. 23-67 Filed stipulation adjourning motion to intervene Jan. 23-67 Filed memorandum in support of motion to intervene Jan. 23-67 Filed memorandum in support of motion to intervene Jan. 23-67 Filed memorandum in support of motion to intervene Jan. 23-67 Filed memorandum of law (filed in court) Jan. 23-67 Filed defts' memorandum of law (filed in court) Jan. 23-67 Filed affdvt. of Edgar J. Van Allsburg in opposition to motions to intervene & declaratory judgment (filed in court) Jan. 23-67 Filed affdvt. of Israel Machtey in opposition (filed in court) Jan. 23-67 Filed affdvt. of Israel Machtey Jan. 23-67 Filed affdvt. of Israel Machtey Jan. 23-67 Filed affdvt. of Vincent Fabrizio Jan. 23-67 Filed affdvt. of Vincent Fabrizio Jan. 23-67 Filed memorandum of law (filed in court) Jan. 23-67 Filed memorandum of law (filed in court) Jan. 23-67 Filed memorandum of law (filed in court) Jan. 23-67 Filed memorandum of law (filed in court) Jan. 23-67 Filed memorandum of law (filed in court) Jan. 23-67 Filed memorandum of law (filed in court) Jan. 23-67 Filed memorandum of law (filed in court) Jan. 23-67 Filed memorandum of law (filed in court) Jan. 23-67 Filed memorandum of law (filed in court) Jan. 23-67 Filed memorandum of law (filed in court) Jan. 23-67 Filed m	851
Nov. 29-66 Filed defts' affdvt. & show cause order to "ay all proceedings, etcret. 12-6. Nov. 29-66 Filed defts' memorandum in support of show cause order Dec. 5-66 Filed stip. adjourning defts' motion to 12-20-66 Dec. 19-67 Filed stip. adjourning defts' motion to 1-21-67 Jan. 23-67 Filed affdvt. & notice of motion for leave to intervene Austen B.Colpate & P.M. Colpate as deftsret. 2-11-67 Jan. 23-67 Filed stipulation adjourning motion now ret. 1/d1/67 to 2/7/67. Jan. 23-67 Filed stipulation adjourning motion now ret. 1/d1/67 to 2/7/67. Jan. 23-67 Filed stipulation adjourning motion to amend complaint-ret. 2-21-67 Jan. 23-67 Filed stipulation adjourning motion to in ervene to 2-21-67 Jan. 23-67 Filed stipulation adjourning motion to intervene Jan. 23-67 Filed memorandum in support of motion to intervene Jan. 23-67 Filed memorandum in support of motion to intervene Jan. 23-67 Filed memorandum in support of motion to intervene Jan. 23-67 Filed memo endorsed on phow dause order filed 11-29-66-deft's motion is set don Jan. 23-67 Filed defts' memorandum of law (filed in court) Jan. 23-67 Filed affdvt. of Edgar J. Van Allsburg in opposition to motions to intervene & declaratory judgment (filed in court) Jan. 23-67 Filed affdvt. of Israel Machtey in opposition (filed in court) Jan. 23-67 Filed affdvt. of Israel Machtey Jan. 23-67 Filed affdvt. of Israel Machtey Jan. 23-67 Filed affdvt. of Vincent Fabrizio Motion for leave to amend its complaint is defined. So ordered-McLean, Jm.n. Jan. 23-67 Filed opinion #33.1/6-Accordingly, by separate memorandum of filed in court is defined. So ordered-McLean, Jm.n. Jan. 23-67 Filed opinion #33.1/6-Accordingly, by separate memorandum of filed in court is defined. So ordered-McLean, Jm.n.	\$ 5 T
Nov. 29-66 Filed defts' memorandum in support of show cause order Dec. 5-66 Filed stip. adjourning defts' motion to 12-20-66 Dec. 19-66 Filed stip. adjourning defts' motion to 1-21-67 Jan. 23-67 Filed affdvt. & notice of motion for leave to intervene Austen B.Colpate & P.M. Colpate as deftsret. 2-11-67 Jan. 23-67 Filed stipulation adjourning motion now ret. 1/4/67 to 2/7/67. Jan. 23-67 Filed stipulation adjourning motion now ret. 1/4/67 to 2/7/67. Jan. 23-67 Filed stipulation adjourning motion now ret. 1/4/67 to 2/7/67. Jan. 23-67 Filed stipulation adjourning motion to amend complaint-ret. 2-21-67 Jan. 23-67 Filed stipulation adjourning motion to intervene to 2-21-67 Jan. 23-67 Filed memorandum in support of motion to intervene Jan. 23-67 Filed memorandum in support of motion to intervene Jan. 23-67 Filed memorandum in support of motion to intervene Jan. 23-67 Filed memorandum of particle in court intervene Jan. 23-67 Filed defts' memorandum of law (filed in court) Jan. 23-67 Filed affdvt. of Edgar J. Van Allsburg in opposition to motions to intervene & declaratory judgment (filed in court) Jan. 23-67 Filed affdvt. of Israel Machtey in opposition (filed in court) Jan. 23-67 Filed affdvt. of Israel Machtey in opposition (filed in court) Jan. 23-67 Filed affdvt. of Israel Machtey in opposition (filed in court) Jan. 23-67 Filed affdvt. of Seymour J. Sindeband Jan. 25-67 Filed affdvt. of Vincent Fabrizio Jan. 25-67 Filed affdvt. of Vincent Fabrizio Jan. 25-67 Filed memorandum of law (filed in court) Jan. 25-67 Filed memorandum of law (filed in court) Jan. 25-67 Filed memorandum of law (filed in court) Jan. 25-67 Filed memorandum of law (filed in court) Jan. 25-67 Filed memorandum of law (filed in court) Jan. 25-67 Filed memorandum of law (filed in court) Jan. 25-67 Filed memorandum of law (filed in court) Jan. 25-67 Filed memorandum of law (filed in court) Jan. 25-67 Filed memorandum of law (filed in court) Jan. 25-67 Filed memorandum of law (filed in court) Jan. 25-67 Filed memora	851
Dec. 5-66 Filed stip. adjourning defts' motion to 12-20-66 Dec. 19-66 Filed stip. adjourning defts' motion to 1-21-67 Jan. 23-67 Filed affdvt. & notice of motion for leave to intervene Austen E.Colpate & P.M. Colpate as deftsret. 2-11-67 Jan. 23-67 Filed atjulation adjourning motion now ret. 1/d1/67 to 2/7/67. dec. 8-67 Filed pltff's affdvt. & notice of motion to amend complaint-ret. 2-21-67 10-67 Filed stip. adjourning motion to in ervene to 2-21-67 10-67 Filed memorandum in support of motion to intervene 10-67 Filed memorandum in support of motion to intervene 10-67 Filed memorandum in support of motion to intervene 10-68 Filed memorandum in support of motion to intervene 10-69 Filed memorandum in support of motion to intervene 10-69 Filed memorandum in support of motion to intervene 10-60 Filed memorandum in support of motion to intervene 10-60 Filed memorandum in support of motion to intervene 10-61 Filed defts' memorandum of law (filed in court) 10-62 Filed defts' memorandum of law (filed in court) 10-63 Filed affdvt. of Edgar J. Van Allsburg in opposition to motions to intervene & declaratory judgment (filed in court) 10-64 Filed affdvt. of Israel Machtey in opposition (filed in court) 10-65 Filed reply brief for applicants for intervention 10-67 Filed affdvt. of Israel Machtey 10-67 Filed affdvt. of Israel Machtey 10-67 Filed affdvt. of Israel Machtey 10-67 Filed affdvt. of Vincent Fabrizio 10-68 Filed memo endorsed on motion to amend complaint - filed 2-8-67-Pltff's 10-69 Filed memo endorsed on motion to amend complaint is denied. So ordered-McLean, Jm.n. 10-69 Filed opinion #33.176-Accordingly, by separate memorandum of law is denied. So ordered-McLean, Jm.n.	851
Dec. 19-66 Filed stip. adjourning defts' motion to 1-21-66 Jan. 23-67 Filed affdvt. & notice of motion for leave to intervene Austen E.Colpate & P.M. Colpate as deftsret. 2-lh-67 Jan. 23-67 Filed stipulation adjourning motion now ret. 1/41/67 to 2/7/67. 6b. 6-67 Filed stipulation adjourning motion now ret. 1/41/67 to 2/7/67. 6c. 10-67 Filed stip. adjourning motion to amend complaint-ret. 2-21-67 15c. 15-67 Filed memorandum in support of motion to intervene to 2-21-67 15c. 15-67 Filed memorandum in support of motion to intervene 15c. 15-67 Filed memorandum in support of motion to intervene 15c. 15-67 Filed memorandum in support of motion to intervene 15c. 15-67 Filed defts' memorandum of law (filed in court) 15c. 21-67 Filed defts' memorandum of law (filed in court) 15c. 21-67 Filed affdvt. of Edgar J. Van Allsburg in opposition to motions to intervene & declaratory judgment (filed in court) 15c. 21-67 Filed affdvt. of Israel Machtey in opposition (filed in court) 15c. 21-67 Filed affdvt. of Israel Machtey in opposition (filed in court) 15c. 21-67 Filed reply brief for defts. 15c. 21-67 Filed affdvt. of Israel Machtey 15c. 21-67 Filed affdvt. of Vincent Fabrizio 15c. 21-67 Filed memo endorsed on motion to amend complaint - filed 2-8-67-Pltff's 15c. 21-67 Filed memo endorsed on motion to amend complaint is denied. So ordered-McLean, Jm.n. 15c. 25-67 Filed Opinion #33.476-Accordingly, by separate memorandum of the separate memorandum of	\$15 T
Jan. 23-67 Filed affdvt. & notice of motion for leave to intervene Austen B.Colpate & P.M. Colpate as deftsret. 2-11-67 Jan. 23-67 Filed stipulation adjourning motion now ret. 1/A1/67 to 2/7/67. 6b. 6-67 Filed pltft's affdvt. & notice of motion to amend complaint-ret. 2-21-67 10-67 Filed stip. adjourning motion to in ervene to 2-21-67 10-67 Filed memorandum in support of motion to intervene 10-67 Filed memorandum in support of motion to intervene 10-67 Filed memo endorsed on show dause order filed 11-29-66-deft's motion is set dom a hearing at 10:00 a.m. on Friday, 5-19-67pltff's motion for leave to amend its complaint is denied. So ordered-McLean, Jmailed notice 10-67 Filed defts' memorandum of law (filed in court) 10-67 Filed affdvt. of Edgar J. Van Allsburg in opposition to motions to intervene & declaratory judgment (filed in court) 10-67 Filed affdvt. of Israel Machtey in opposition (filed in court) 10-67 Filed reply brief for defts, 10-67 Filed affdvt. of Israel Machtey in opposition (filed in court) 10-68 Filed affdvt. of Israel Machtey 10-69 Filed memo endorsed on motion to amend complaint - filed 2-8-67-Pltff's 10-69 Filed memo endorsed on motion to amend complaint is denied. So ordered-McLean, Jm.n. 10-60 Filed Opinion #33.1/76-Accordingly by separate memorandum filed filed filed in forcer filed filed opinion #33.1/76-Accordingly by separate memorandum filed f	\$15 T
Colpate as defts. ret. 2-II-67 Colpate as defts. ret. 2-II-67 Ian. 23-67 Filed stipulation adjourning motion now ret. 1/4/67 to 2/7/67. 60. 6-67 Filed pltff's affdvt. 2 notice of motion to amend complaint-ret. 2-21-67 10-67 Filed stip. adjourning motion to in ervene to 2-21-67 10-67 Filed memorandum in support of motion to intervene 10-67 Filed memo endorsed on show cause order filed 11-29-66-deft's motion is set don a hearing at 10:00 a.m. on Friday, 5-19-67-pltff's motion for leave to amend its complaint is denied. So ordered-McLean, Jmailed notice 10-67 Filed defts' memorandum of law (filed in court) 10-68 Filed affdvt. of Edgar J. Van Allsburg in opposition to motions to intervene to amend 10-69 Filed affdvt. of Israel Machtey in opposition (filed in court) 10-69 Filed affdvt. of Israel Machtey in opposition (filed in court) 10-69 Filed affdvt. of Israel Machtey in opposition (filed in court) 10-69 Filed affdvt. of Israel Machtey 10-69 Filed affdvt. of Vincent Fabrizio 10-69 Filed affdvt. of Vincent Fabrizio 10-69 Filed memo endorsed on motion to amend complaint - filed 2-8-67-Pltff's 10-60 Filed opinion #33.1/6-Accordingly by separate a memorandum of Indicated in convention of the complaint is defined in conventi	\$15 T
Isn. 23-67 Filed stipulation adjourning motion now ret. 1/11/67 to 2/7/67. 60. 6-67 Filed pltff's affdvt. In notice of motion to amend complaint-ret. 2-21-67 10-67 Filed stip. adjourning motion to in ervene to 2-21-67 115-67 Filed memorandum in support of motion to intervene 115-67 Filed memo endorsed on show dause order filed 11-29-66-deft's motion is set don 115-67 a hearing at 10:00 a.m. on Friday, 5-19-67pltff's motion for leave to amend 115 complaint is denied. So orderedMcLean, Jmailed notice 115 complaint is denied in court) 116 court is real filed in court intervention 117 court is real filed in court intervention 118 complaint is denied. So ordered-McLean, Jm.n. 118 complaint is denied. So ordered-McLean, Jm.n. 119 court is real filed. So ordered-McLean, Jm.n. 119 court is real filed. So ordered-McLean, Jm.n. 110 court is real filed. So ordered-McLean, Jm.n.	\$15 T
10-6 Filed stip. adjourning motion to amend complaint-ret. 2-21-67 10-6 Filed stip. adjourning motion to in ervene to 2-21-67 10-6 Filed stip. adjourning motion to in ervene to 2-21-67 10-6 Filed memorandum in support of motion to intervene 10-6 Filed memorandum in support of motion to intervene 10-6 Filed memorandum in support of motion to intervene 10-6 Filed memo endorsed on show dause order filed 11-29-66-deft's motion is set dom 10-6 a hearing at 10:00 a.m. on Friday, 5-19-67-pltf's motion for leave to amend 10-6 Filed memorandum of law (filed in court) 10-6 Filed defts' memorandum of law (filed in court) 10-6 Filed affdvt. of Edgar J. Van Allsburg in opposition to motions to intervene to declaratory judgment (filed in court) 10-6 Filed affdvt. of Israel Machtey in opposition (filed in court) 10-7 Filed reply brief for applicants for intervention 10-7 Filed affdvt. of Israel Machtey 10-7 Filed affdvt. of Israel Machtey 10-7 Filed affdvt. of Seymour J. Sindeband 10-7 Filed affdvt. of Vincent Fabrizio 10-7 Filed affdvt. of Vincent Fabrizio 10-7 Filed memo endorsed on motion to amend complaint - filed 2-8-67-pltff's motion for leave to amend its complaint is denied. So ordered-McLean, Jm.n. 10-7 Filed Opinion #33.176-Accordingly, by separate memorandum filed-McLean, Jm.n.	200
10-6 Filed stip. adjourning motion to amend complaint-ret. 2-21-67 10-6 Filed stip. adjourning motion to in ervene to 2-21-67 10-6 Filed stip. adjourning motion to in ervene to 2-21-67 10-6 Filed memorandum in support of motion to intervene 10-6 Filed memorandum in support of motion to intervene 10-6 Filed memorandum in support of motion to intervene 10-6 Filed memo endorsed on show dause order filed 11-29-66-deft's motion is set dom 10-6 a hearing at 10:00 a.m. on Friday, 5-19-67-pltf's motion for leave to amend 10-6 Filed memorandum of law (filed in court) 10-6 Filed defts' memorandum of law (filed in court) 10-6 Filed affdvt. of Edgar J. Van Allsburg in opposition to motions to intervene to declaratory judgment (filed in court) 10-6 Filed affdvt. of Israel Machtey in opposition (filed in court) 10-7 Filed reply brief for applicants for intervention 10-7 Filed affdvt. of Israel Machtey 10-7 Filed affdvt. of Israel Machtey 10-7 Filed affdvt. of Seymour J. Sindeband 10-7 Filed affdvt. of Vincent Fabrizio 10-7 Filed affdvt. of Vincent Fabrizio 10-7 Filed memo endorsed on motion to amend complaint - filed 2-8-67-pltff's motion for leave to amend its complaint is denied. So ordered-McLean, Jm.n. 10-7 Filed Opinion #33.176-Accordingly, by separate memorandum filed-McLean, Jm.n.	200
15-67 Filed memorandum in support of motion to intervene 15-67 Filed memorandum in support of motion to intervene 15-67 Filed memorandum in support of motion to intervene 15-67 Filed memorandum in support of motion to intervene 15-67 Filed memorandum on Friday, 5-19-67pltff's motion for leave to amenorate its complaint is denied. So orderedMcLean, Jmailed notice 15-67 Filed defts' memorandum of law (filed in court) 16-67 Filed affdvt. of Edgar J. Van Allsburg in opposition to motions to intervene & declaratory judgment (filed in court) 16-67 Filed affdvt. of Israel Machtey in opposition (filed in court) 16-67 Filed reply brief for defts. 16-68 September 15-69 Filed affdvt. of Israel Machtey 16-69 Filed affdvt. of Israel Machtey 16-69 Filed affdvt. of Israel Machtey 16-69 Filed affdvt. of Seymour J. Sindeband 16-69 Filed affdvt. of Vincent Fabrizio 16-69 Filed affdvt. of Vincent Fabrizio 16-69 Filed memorandum of law (filed in court) 16-69 Filed option #33.176Accordingly by separate memorandum filed mem	200
a hearing at 10:00 a.m. on Friday, 5-19-67pltff's motion for leave to amend its complaint is denied. So orderedMcLean, Jmailed notice 10-21-67 Filed defts' memorandum of law (filed in court) 10-21-67 Filed affdvt. of Edgar J. Van Allsburg in opposition to motions to intervene to declaratory judgment (filed in court) 10-21-67 Filed affdvt. of Israel Machtey in opposition (filed in court) 10-21-67 Filed affdvt. of Israel Machtey in opposition (filed in court) 10-21-67 Filed reply brief for defts. 10-21-67 Filed affdvt. of Israel Machtey 10-21-67 Filed affdvt. of Israel Machtey 10-21-67 Filed affdvt. of Israel Machtey 10-21-67 Filed affdvt. of Seymour J. Sindeband 10-21-67 Filed affdvt. of Vincent Fabrizio 10-21-67 Filed affdvt. of Vincent Fabrizio 10-21-67 Filed memo endorsed on motion to amend complaint - filed 2-8-67-Pltff's motion for leave to amend its complaint is denied. So ordered-McLean, Jm.n. 10-21-67 Filed Opinion #33.176Accordingly, by separate memorandum filed heave.	200
a hearing at 10:00 a.m. on Friday, 5-19-67pltff's motion for leave to amend its complaint is denied. So orderedMcLean, Jmailed notice 10-21-67 Filed defts' memorandum of law (filed in court) 10-21-67 Filed affdvt. of Edgar J. Van Allsburg in opposition to motions to intervene to declaratory judgment (filed in court) 10-21-67 Filed affdvt. of Israel Machtey in opposition (filed in court) 10-21-67 Filed affdvt. of Israel Machtey in opposition (filed in court) 10-21-67 Filed reply brief for defts. 10-21-67 Filed affdvt. of Israel Machtey 10-21-67 Filed affdvt. of Israel Machtey 10-21-67 Filed affdvt. of Israel Machtey 10-21-67 Filed affdvt. of Seymour J. Sindeband 10-21-67 Filed affdvt. of Vincent Fabrizio 10-21-67 Filed affdvt. of Vincent Fabrizio 10-21-67 Filed memo endorsed on motion to amend complaint - filed 2-8-67-Pltff's motion for leave to amend its complaint is denied. So ordered-McLean, Jm.n. 10-21-67 Filed Opinion #33.176Accordingly, by separate memorandum filed heave.	m for
its complaint is denied. So orderedMcLean, Jmailed notice 10. 21-67 Filed defts' memorandum of law (filed in court) 10. 21-67 Filed affdvt. of Edgar J. Van Allsburg in opposition to motions to intervene & declaratory judgment (filed in court) 10. 21-67 Filed affdvt. of Israel Machtey in opposition (filed in court) 10. 21-67 Filed reply brief for defts. 10. 3-67 Filed reply brief for applicants for intervention 10. 3-67 Filed affdvt. of Israel Machtey 10. 3-67 Filed affdvt. of Israel Machtey 10. 3-67 Filed affdvt. of Seymour J. Sindeband 10. 3-67 Filed affdvt. of Vincent Fabrizio 10. 3-67 Filed affdvt. of Vincent Fabrizio 10. 3-67 Filed memo endorsed on motion to amend complaint - filed 2-8-67-Pltff's motion for leave to amend its complaint is denied. So ordered-McLean, Jm.n. 10. 3-18-19-07-19-11-11-11-11-11-11-11-11-11-11-11-11-	
complaint is denied. So orderedMcLean, Jmailed notice Filed defts' memorandum of law (filed in court) G. 21-67 Filed affdvt. of Edgar J. Van Allsburg in opposition to motions to intervene & declaratory judgment (filed in court) Filed affdvt. of Israel Machtey in opposition (filed in court) Filed reply brief for defts. May 5-67 Filed reply brief for applicants for intervention Filed affdvt. of Israel Machtey May 5-67 Filed reply affdvt. of Seymour J. Sindeband Filed reply affdvt. of Seymour J. Sindeband Filed pltff's memorandum of law (filed in court.) May 5-67 Filed affdvt. of Vincent Fabrizio May 5-67 Filed memo endorsed on motion to amend complaint - filed 2-8-67-Pltff's motion for leave to amend its complaint is denied. So ordered-McLean, Jm.n. May 5-67 Filed Opinion #33.176Accordingly, by separate memorandum filed beautiful and the separate filed beautiful and the s	
21-67 Filed affdvt. of Edgar J. Van Allsburg in opposition to motions to intervene & declaratory judgment (filed in court) 68. 21-67 Filed affdvt. of Israel Machtey in opposition (filed in court) 68. 21-67 Filed reply brief for defts. 69. 21-67 Filed reply brief for applicants for intervention 69. 21-67 Filed affdvt. of Israel Machtey 69. 21-67 Filed reply affdvt. of Seymour J. Sindeband 69. 21-67 Filed pltff's memorandum of law (filed in court.) 69. 21-67 Filed affdvt. of Vincent Fabrizio 69. 21-67 Filed memo endorsed on motion to amend complaint - filed 2-8-67-Pltff's 69. 21-67 Filed Opinion #33.176-Accordingly. by separate memorandum filed had been approximated by separate memorandum filed by separate filed by separate filed filed by separate filed by separate filed filed by separate filed by separate filed filed filed by separate filed filed by separate filed fi	
Teb. 21-67 Filed affdvt. of Israel Machtey in opposition (filed in court) May 5-67 Filed reply brief for defts. May 5-67 Filed reply brief for applicants for intervention Jay 5-67 Filed affdvt. of Israel Machtey May 5-67 Filed reply affdvt. of Seymour J. Sindeband Jeb. 21-67 Filed pltff's memorandum of law (filed in court.) May 5-67 Filed affdvt. of Vincent Fabrizio May 5-67 Filed memo endorsed on motion to amend complaint - filed 2-8-67-Pltff's motion for leave to amend its complaint is denied. So ordered-McLean, Jm.n. May 5-67 Filed Opinion #33.176Accordingly, by separate memorandum filed	7.
Teb. 21-67 Filed affdvt. of Israel Machtey in opposition (filed in court) May 5-67 Filed reply brief for defts. May 5-67 Filed reply brief for applicants for intervention Jay 5-67 Filed affdvt. of Israel Machtey May 5-67 Filed reply affdvt. of Seymour J. Sindeband Jeb. 21-67 Filed pltff's memorandum of law (filed in court.) May 5-67 Filed affdvt. of Vincent Fabrizio May 5-67 Filed memo endorsed on motion to amend complaint - filed 2-8-67-Pltff's motion for leave to amend its complaint is denied. So ordered-McLean, Jm.n. May 5-67 Filed Opinion #33.176Accordingly, by separate memorandum filed	1. 1185
May 5-67 Filed reply brief for applicants for intervention [av 5-67 Filed affdyt. of Israel Machtey [av 5-67 Filed reply affdyt. of Seymour J. Sindeband [6b. 21-67 Filed pltff's memorandum of law (filed in court.) [av 5-67 Filed affdyt. of Vincent Fabrizio [av 5-67 Filed memo endorsed on motion to amend complaint - filed 2-8-67-Pltff's motion for leave to amend its complaint is denied. So ordered-McLean, Jm.n. [av 5-67 Filed Opinion #33.176-Accordingly, by separate memorandum filed hear, Jm.n.	
May 5-67 Filed reply brief for applicants for intervention [av 5-67 Filed affdyt. of Israel Machtey [av 5-67 Filed reply affdyt. of Seymour J. Sindeband [av 5-67 Filed pltff's memorandum of law (filed in court) [av 5-67 Filed affdyt. of Vincent Fabrizio [av 5-67 Filed memo endorsed on motion to amend complaint - filed 2-8-67-Pltff's [av 5-67 Filed Opinion #33.176Accordingly, by separate memorandum filed memorandum filed memorandum filed opinion #33.176Accordingly, by separate memorandum filed memorandum fi	18
Tay 5-67 Filed affdyt. of Israel Machtey Tay 5-67 Filed reply affdyt, of Seymour J. Sindeband Teb. 21-67 Filed pltff's memorandum of law (filed in court.) Tay 5-67 Filed affdyt. of Vincent Fabrizio May 5-67 Filed memo endorsed on motion to amend complaint - filed 2-8-67-Pltff's motion for leave to amend its complaint is denied. So ordered-McLean, Jm.n. Tay 5-67 Filed Opinion #33.176-Accordingly, by separate memorandum filed had been and the complaint.	11/15/
May 5-67 Filed reply affdvt, of Seymour J. Sindeband feb. 21-67 Filed pltff's memorandum of law (filed in court) May 5-67 Filed affdvt. of Vincent Fabrizio May 5-67 Filed memo endorsed on motion to amend complaint - filed 2-8-67-Pltff's motion for leave to amend its complaint is denied. So ordered-McLean, Jm.n. May 5-67 Filed Opinion #33.176-Accordingly, by separate memorandum filed had been provided to the complaint of	
May 5-67 Filed affdyt. of Vincent Fabrizio May 5-67 Filed memo endorsed on motion to amend complaint - filed 2-8-67-Pltff's motion for leave to amend its complaint is denied. So ordered-McLean, Jm.n. May 5-67 Filed Opinion #33.176-Accordingly, by separate memorandum filed have to a mem	- 43
May 5-67 Filed affdyt, of Vincent Fabrizio May 5-67 Filed memo endorsed on motion to amend complaint - filed 2-8-67-Pltff's motion for leave to amend its complaint is denied. So ordered-McLean, Jm.n. May 5-67 Filed Opinion #33.176Accordingly, by separate memorandum filed beautiful.	
motion for leave to amend its complaint is denied. So ordered-McLean, Jm.n. May 5-67 Filed Opinion #33.176-Accordingly, by separate memory filed by filed	
motion for leave to amend its complaint is denied. So ordered-McLean, Jm.n.	
The state of the s	
respect to Motion No. 86, I have set that issue down for a hearing-I will not	
1 Class applicants to serve as amici curipe at the forthografing beauty	100
no. of it they so desire. They may attend the hearing newticinets in it	-
The same of the sa	1 1/4
1 TOPALLOY OF THE CONTRACT MOTION denied So ordered Malaca I 17-3	1
A super Co as a structure of the casualty & Super Co	
1 poy, ucit, eret, 0=13=0/	
June 12-67 Filed memorandum in support of show cause order to intervene	
with 13-04 Filed Stip. Worder that hearing ordered by Judge McLean in his decision dated	
1 5-5-07 be set for 6-19-67- at 11 a.m. before McLean I McLean I	. 77.68
AND THE PROPERTY OF THE PROPER	
of show cause order	
	0.000
	4.47.37
	out
prejudice to its renewal after issue has been joined by all the present partie to the action-So orderedMcLean, Jmailed notice	3
uly 6-67 Filed Opinion #33,769-Deft. Board of Education's motion to compel arbitration is	
denied-So ordered-McLean, Jmailed notice	-
////	110
cont'd on page 2	-
	-

-66 Civ. 2935 Fabrizio & Martin, Inc. Board of Education Central School Lv. 2935

DATE	PROCEEDINGS	Date Ord
13-67	Filed stip & order outsides destains	Judgment
11-67	Filed stip. & order extending defts' time to answer to 8-8-67-Bonsal, J. Filed defts' ANSWER & counterclaim	
31-67	Filed stip. & order extending pltff's time to reply to answer of defts. to	LEY
	10-10-67McLean, J.	
ot. 6-67	Filed defts affdyt & notice of motion for summary judgment ret. 9-19-67	
ot. 6-67	Filed defts memorandum of law in support of its motion	
ot.18-67	Filed stipulation between parties-that motion for summary judgment ret.9-19-67	
ATT	adjourned to 9-26-67	
	Filed stipulation between parties that-motion for summay judg.for 9-19-67	
100	Filed memo endorsed on motion filed 9-6-67-I disqualify myself from passing	
CALLED	upon deft's motion for my more ludged alsqualify myself from passing	
2.54	Part to be placed on the Calendar for Tuesday, Nov. 11, 67-Bonsal, J.	
1		
6-68	Filed stip and Order - time for the nitffe to nonly to the	146
	of the defts is ext. to Sept. 6-1968 - so ordered - Ryan, J.	- 34
8 2-68	Filed Opinion #35241 -Motion to strike the complaint is greated	
4	motions for summary judgment on the fourth and fifth counterclain are denied. So ordered Ryan, J. m/n	
11.00	are denied. So ordered Rean. J. m/n	IS O
33	RECEIVED SCOULD CENTIFIED Check in Tion of pand day a	- 18
WATER OF	Led Pltffs. Notice of Appeal for the Second Circuit and mailed	<u> </u>
70.00	E ROMA NA MOUTOUR MUDERT NO FOLIS R. VRIMAN NO D DONA CHACAL IN THE	- 2/2
	First Alligavit of Lagina A. Hyper in opposition to matter as 1 at /mas	191
9669	an appeal.	to)
24-	on appeal.	-
Marketon Miles and all	TITA DULLOS DY DILLI'S FACORO ON ANNON! has been contified a to-	
the advertised to the said	The Bacourt of Appeals.	•
the advertised to the said	The Bacourt of Appeals.	•
.0469	Siled true copy from the U.S.C. of Appeals: Ordered that the appeal from the order	•
.8460 -	### 1.5. Court of Appeals. 1. S. Court of App	•
8469	**H.S.Court of Appeals. **H.S.Court of Appeals. **List true copy from the U.S.C. of Appeals: Ordered that the appeal from the order **List true copy from the U.S.C. of Appeals: Ordered that the appeal from the order **List true copy from the U.S.C. of Appeals: Ordered that the appeal from the order **List true copy from the U.S.C. of Appeals: Ordered that the appeal from the order **List true copy from the U.S.C. of Appeals: Ordered that the appeal from the order **List true copy from the U.S.C. of Appeals: Ordered that the appeal from the order **List true copy from the U.S.C. of Appeals: Ordered that the appeal from the order **List true copy from the U.S.C. of Appeals: Ordered that the appeal from the order **List true copy from the U.S.C. of Appeals: Ordered that the appeal from the order **List true copy from the U.S.C. of Appeals: Ordered that the appeal from the order **List true copy from the U.S.C. of Appeals: Ordered that the appeal from the order **List true copy from the U.S.C. of Appeals: Ordered that the appeal from the order **List true copy from the U.S.C. of Appeals: Ordered that the appeal from the order **List true copy from the U.S.C. of Appeals: Ordered that the appeal from the order **List true copy from the U.S.C. of Appeals: Ordered that the appeal from the order **List true copy from the U.S.C. of Appeals: Ordered that the appeal from the order **List true copy from the U.S.C. of Appeals: Ordered that the appeal from the order **List true copy from the U.S.C. of Appeals: Ordered that the appeal from the order **List true copy from the U.S.C. of Appeals: Ordered that the appeal from the order **List true copy from the U.S.C. of Appeals: Ordered that the appeal from the order **List true copy from the U.S.C. of Appeals: Ordered that the appeal from the order **List true copy from the U.S.C. of Appeals: Ordered that the appeal from the order **List true copy from the U.S.C. of Appeals: Ordered that the appeal from the order **List true copy from the U.S.C. of Appea	•
20-69 30-69	Solution of Appeals. Siled true copy from the U.S.C. of Appeals: Ordered that the appeal from the order single true copy from the U.S.C. of Appeals: Ordered that the appeal from the order single true copy from the U.S.C. of Appeals: Ordered that the appeal from the order single true copy from the U.S.C. of Appeals: Ordered that the appeal from the order single true copy from the U.S.C. of Appeals: Ordered that the appeal from the order single true copy from the Order than the appeal from the order single true copy from the U.S.C. of Appeals: Ordered that the appeal from the order single true copy from the U.S.C. of Appeals: Ordered that the appeal from the order single true copy from the U.S.C. of Appeals: Ordered that the appeal from the order single true copy from the U.S.C. of Appeals: Ordered that the appeal from the order single true copy from the U.S.C. of Appeals: Ordered that the appeal from the order single true copy from the U.S.C. of Appeals: Ordered that the appeal from the order single true copy from the U.S.C. of Appeals: Ordered that the appeal from the order single true copy from the U.S.C. of Appeals: Ordered that the appeal from the order single true copy from the U.S.C. of Appeals: Ordered that the appeal from the order single true copy from the U.S.C. of Appeals: Ordered that the appeal from the order single true copy from the U.S.C. of Appeals: Ordered that the appeal from the order single true copy from the U.S.C. of Appeals: Ordered that the appeal from the order single true copy from the U.S.C. of Appeals: Ordered that the appeal from the order single true copy from the U.S.C. of Appeals: Ordered that the appeal from the Ordered t	•
20-69 30-69	Solution of Appeals. Siled true copy from the U.S.C. of Appeals: Ordered that the appeal from the order single true copy from the U.S.C. of Appeals: Ordered that the appeal from the order single true copy from the U.S.C. of Appeals: Ordered that the appeal from the order single true copy from the U.S.C. of Appeals: Ordered that the appeal from the order Judgment is dismissed with costs to be taxed against the appealant. Clerk. Filed deft's-Appellees NOTE OF ISSUE and statement of readiness. Filed pltff's affidavit & notice of motion to amend order of 10-1-68-ret.11-18-69. Filed pltff's objection to deft's note of issue.	•
20-69 30-69 11-69	Solution of Appeals. Siled true copy from the U.S.C. of Appeals: Ordered that the appeal from the order is dismissed with costs to be taxed against the appellant. Clerk. Judgment Entered. Clerk. Filed deft's-Appellees NOTE OF ISSUE and statement of readiness. Filed pltff's affidavit & notice of motion to amend order of 10-1-68-ret.11-18-69. Filed pltff's objection to deft's note of issue.	
20-69 30-69	Solution of Appeals. Siled true copy from the U.S.C. of Appeals: Ordered that the appeal from the order is dismissed with costs to be taxed against the appealant. Clerk. Judgment Entered. Clerk. Filed deft's-Appellees NOTE OF ISSUE and statement of readiness. Filed pltff's affidavit & notice of motion to amend order of 10-1-68-ret.11-18-69. Filed pltff's objection to deft's note of issue. Filed affidavit in opposition by Sheldon V. Burman to pltff's application.	
20-69 30-69	Solution of Appeals. Siled true copy from the U.S.C. of Appeals: Ordered that the appeal from the order is dismissed with costs to be taxed against the appealant. Clerk. Judgment Entered. Clerk. Filed deft's-Appellees NOTE OF ISSUE and statement of readiness. Filed pltff's affidavit & notice of motion to amend order of 10-1-68-ret.11-18-69. Filed pltff's objection to deft's note of issue. Filed affidavit in opposition by Sheldon V. Burman to pltff's application.	
20-69 30-69	Solution of Appeals. Siled true copy from the U.S.C. of Appeals: Ordered that the appeal from the order is dismissed with costs to be taxed against the appealant. Clerk. Judgment Entered. Clerk. Filed deft's-Appellees NOTE OF ISSUE and statement of readiness. Filed pltff's affidavit & notice of motion to amend order of 10-1-68-ret.11-18-69. Filed pltff's objection to deft's note of issue. Filed affidavit in opposition by Sheldon V. Burman to pltff's application.	
20-69 30-69	Filed pltff's affidavit & notice of motion to amend order of 10-1-68-ret.ll-18-69 Filed pltff's affidavit & notice of issue. Filed pltff's amemorandum of law in opposition to motion of pltff's application. Filed bltfs memorandum of law in opposition to motion of pltff's application. Filed pltff's memorandum of law in opposition to motion of pltff's application. Filed pltff's memorandum of law in opposition to motion of pltff's application. Filed pltff's memorandum of law in opposition to motion of pltff's application.	
20-69 30-69	Filed pltff's affidavit & notice of motion to amend order of 10-1-68-ret.ll-18-69 Filed affidavit in opposition by Sheldon V. Burman to pltff's application. Filed affidavit in opposition by Sheldon V. Burman to pltff's application. Filed pltff's memorandum of law in opposition to motion of pltff. Filed pltff's memorandum of law in opposition to motion of pltff. Filed pltff's memorandum of law in opposition to motion of pltff. Filed pltff's memorandum of law in opposition to motion of pltff. Filed pltff's memorandum of law in opposition to motion of pltff. Filed pltff's memorandum of law in opposition to motion of pltff. Filed pltff's memorandum of law in opposition to motion of pltff. Filed pltff's memorandum of law in opposition to motion of pltff. Filed pltff's memorandum of law in opposition to motion of pltff. Filed memo endorsed on motion filed 10-30-69-Motion withdram So ordered-Ryan and memorandum of law in oppositions to note of issue dated 10-30-69	
20-69 30-69	Siled true copy from the U.S.C. of Appeals: Ordered that the appeal from the order in judgment is dismissed with costs to be taxed against the appeal from the order Judgment Entered. Clerk. Filed deft's-Appellees NOTE OF ISSUE and statement of readiness. Filed pltff's affidavit & notice of motion to amend order of 10-1-68-ret.11-18-69. Filed pltff's objection to deft's note of issue. Filed affidavit in opposition by Sheldon V. Burman to pltff's application. Filed pltff's memorandum of law in opposition to motion of pltff. Filed pltff's memorandum of law in opposition to motion of pltff. Filed pltff's memorandum of law in opposition to amend order Filed pltff's memorandum of law in opposition to motion of pltff. Filed memo endersed on motion filed 10-30-69-Motion withdrawn-So ordered-Ryan and memorandum of law in to note of issue dated 10-30-69Objections to note of issue dated 10-30-69Objections to pltff's interrogatories. Pltff has 20 days thereafter in which to take and comp	
20-69 30-69 11-69 10-69 7-70	**H.S.Court of Appeals. **Heat true copy from the U.S.C. of Appeals: Ordered that the appeal from the order by judgment is dismissed with costs to be taxed against the appellant. Clerk. Judgment Entered. Clerk. Filed deft's-Appellees NOTE OF ISSUE and statement of readiness. Filed pltff's affidavit & notice of motion to amend order of 10-1-68-ret.11-18-69 Filed pltff's objection to deft's note of issue. Filed affidavit in opposition by Sheldon V. Burman to pltff's application. Filed deft's memorandum of law in opposition to motion of pltff. Filed pltffs *** memorandum of law in opposition to motion of pltff. Filed pltffs *** memorandum of law in opposition to amend order Filed pltffs *** memorandum of law in opposition to amend order Filed memo endorsed on motion filed 10-30-69-Motion withdrawn-So ordered-Ryan of the memorandum of the motion of law in which to serve and file answers to pltff's interrogatories. Pltff has 20 days thereafter in which to take and compored especitions-So ordered-Motley.J.	
20-69 30-69	***Local Section of Appeals. ***Local Section of Appeals. **Local Sectio	
20-69 30-69 30-69 11-69 1-70	The state of Appeals. Siled true copy from the U.S.C. of Appeals: Ordered that the appeal from the order by judgment is dismissed with costs to be taxed against the appealant. Clerk. Judgment Entered. Clerk. Filed deft's-Appellees NOTE OF ISSUE and statement of readiness. Filed pltff's affidavit & notice of motion to amend order of 10-1-68-ret.11-18-69. Filed pltff's objection to deft's note of issue. Filed affidavit in opposition by Sheldon V. Burman to pltff's application. Filed deft's memorandum of law in opposition to motion of pltff. Filed bears endorsed on motion filed 10-30-69-Motion withdram-So ordered-Ryan Judged seed of issue ordered or objections to note of issue dated 10-30-69-Objections to pltff's interrogatories. Pltff has 20 days in which to serve and file answers to pltff's interrogatories. Pltff has 20 days thereafter in which to take and comport depositions-So ordered-Motley, J. \$\frac{\text{Miled seaso}}{\text{Appellees}} - \text{received at Judg.Section 1/13/70}	lete
20-69 30-69 30-69 11-69 1-70	### 1.5.Court of Appeals. ### 1.5.Court of Appeals. ### 1.5.Court of Appeals. #### 1.5.Court of Appeals. ###################################	lete
20-69 30-69 30-69 40-69 7-70	I.S.Court of Appeals. II.S.Court of Appeals. II.S.Court of Appeals. II.S.Court of Appeals. II.S.Court of Appeals. III.S.Court of Appeals. II	lete
20-69 30-69 30-69 40-69 7-70	I.S.Court of Appeals. II.S.Court of Appeals. III.S.Court of Appeals. III.S	lete
8669 30-69 30-69 40-69 7-70	I.S.Court of Appeals. II.S.Court of Appeals. II.S.Court of Appeals. III.S.Court of Education answers to interrogatories.	lete
8669 30-69 30-69 40-69 7-70	***I.S.Court of Appeals. ***Eiled true copy from the U.S.C. of Appeals: Ordered that the appeal from the order to judgment is dismissed with costs to be taxed against the appealant. Clerk. **Judgment Entered.** Clerk. **Filed deft's-Appellees NOTE OF ISSUE and statement of readiness. **Filed pltff's affidavit & notice of motion to amend order of 10-1-68-ret.11-18-69. **Filed pltff's objection to deft's note of issue. **Filed affidavit in opposition by Sheldon V. Burman to pltff's application. **Filed affidavit in opposition by Sheldon V. Burman to pltff's application. **Filed affidavit in opposition by Sheldon V. Burman to pltff's application. **Filed affidavit in opposition of law in opposition to motion of pltff. **Filed memorandum of law in opposition to motion of pltff. **Filed memorandum of law in opposition to motion of pltff. **Filed memorandum of law in opposition to motion of pltff's memorandum of law in oppositions to note of issue dated 10-10-69Objections to motion in support of motion to amend order **Filed memorandum of law in opposition to note of issue dated 10-10-69Objections to motion in support of motion to amend order **Filed memorandum of law in oppositions to note of issue dated 10-10-69Objections to motion in the support of the law in the law	lote
8669 30-69 30-69 40-69 7-70	***I.S.Court of Appeals. ***Eiled true copy from the U.S.C. of Appeals: Ordered that the appeal from the order to judgment is dismissed with costs to be taxed against the appealant. Clerk. **Judgment Entered.** Clerk. **Filed deft's-Appellees NOTE OF ISSUE and statement of readiness. **Filed pltff's affidavit & notice of motion to amend order of 10-1-68-ret.11-18-69. **Filed pltff's objection to deft's note of issue. **Filed affidavit in opposition by Sheldon V. Burman to pltff's application. **Filed affidavit in opposition by Sheldon V. Burman to pltff's application. **Filed affidavit in opposition by Sheldon V. Burman to pltff's application. **Filed affidavit in opposition of law in opposition to motion of pltff. **Filed memorandum of law in opposition to motion of pltff. **Filed memorandum of law in opposition to motion of pltff. **Filed memorandum of law in opposition to motion of pltff's memorandum of law in oppositions to note of issue dated 10-10-69Objections to motion in support of motion to amend order **Filed memorandum of law in opposition to note of issue dated 10-10-69Objections to motion in support of motion to amend order **Filed memorandum of law in oppositions to note of issue dated 10-10-69Objections to motion in the support of the law in the law	lote
20-69 30-69 30-69 40-69 40-70 40-70 16-70	#	lote
20-69 30-69 30-69 40-69 40-70 40-70 16-70	#	lote
20-69 30-69 30-69 30-69 7-70 30-70 16-70 16-70	# 11. S.Court of Appeals. **All S.Court of Appeals. **All S.Court of Appeals. **All true copy from the U.S.C. of Appeals: Ordered that the appeal from the order a judgment is dismissed with costs to be taxed against the appealant. Clerk. Judgment Entered. Clerk. Filed deft's Appellees NOTE OF ISSUE and statement of readiness. Filed pltff's affidavit & notice of motion to amend order of 10-1-68-ret.11-18-69. Filed pltff's objection to deft's note of issue. Filed affidavit in opposition by Sheldon V. Burman to pltff's application. Filed affidavit in opposition by Sheldon V. Burman to pltff's application. Filed pltff's memorandum of law in opposition to motion of pltff. Filed memo endorsed on motion filed 10-30-69-Motion withdram-So ordered-Ryan. Filed memo endorsed on Objections to note of issue dated 10-30-69-Objections to note of issue overruled, Deft has 10 days in which to serve and file answers to pltff's interrogatories. Pltff has 20 days thereafter in which to take and composal depositions-So ordered-Motley, J. **Bill of costs from USCA docketed as Judgment #70,457 in favor of 'Appellees - received at Judg.Section 1/13/70. **Bill of costs from USCA docketed as Judgment #70,457 in favor of 'Appellees - received at Judg.Section 1/13/70. **Filed Board of Education answers to interrogatories Filed supplemental answers of deft Board of Education to interrogatories **Filed supplemental answers of deft Board of Education granted extending time of the pltff's affdyt & notice of motion to extend time to complete discovery for pltff's affdyt & notice of motion to extend time to complete discovery for pltff's affdyt & notice of motion to extend time to complete discovery for pltff's affdyt & notice to to the deposition of recent time to complete discovery for pltff's affdyt & notice to notice to take deposition of Robert of pltff's affdyt & notice of motion to notice to take deposition of Robert	lote
20-69 30-69 30-69 40-69 7-70 10-70 16-70 16-70	# 10.8.Court of Appeals. # 11.6.Court of Appeals. # 12.6.Court of Ap	lote
20-69 30-69 30-69 40-69 7-70 16-70 16-70	#	lote

JUDGE CARTER

4.4	page 3 JUDUL CARIER	
DATE	PROCEEDINGS	Date O Judgmen
Jar 13-70	Filed memo endorsed on motion filed this date-Application for adjournment grant to the extent that both parties are directed to complete all discovery on or before 4-10-70. The undersigned will retain supervision of the	A - d
3 1	before 4-10-70. The undersigned will retain supervision of their action to se	rea
11/2 3.2 3	that discovery is completed within that time as to impose appropriate sanctic	ee
pr 15-70	against the party found to be at fault for further delay-So ordered-MacMahor Filed affdyt & Order that the defts show cause before MacMahor	ons m
	at 10 am why an order should not be and the macranon, J. on Apr 15-70	
pr 17-70	complete its pre-trial discovery until May 10-70. MacMahon, J.	-
1	opposition Settle april 111ed Apr 15-70, "Motion granted - no	
22- 7	Filed ORDER that the time for the pltff to complete its pre-trial discovery	"
27-70	Filed Order pursuant to colondar with myn	
4-70	Filed Deft. Board of Ed and Files of 13. Sugarman, Ch J.	
6- 70	Filed Piteria matter a state of Readings, error.	
24-70	Filed Pltff's affdyt & notice of trial counsel.	
24-70	a pre-trial memorandum to Jun 30-70, Ret. 6-24-70.	
	to file a pre-triel morning motion for an order extending time of deft.	"41
24-70	Filed Memo Endomand on doct !-	10
	extending time to file pre-trial memorandum to Sept 14, 1970. So Ordered:	
15-70	Filed Pitff's affdyt & notice of	1 1
pt 25-70	Filed Pitff's affdyt & notice of motion for an order ext. time for filing a pre-	YN'A
191		
The state of	So Onderede 7 -1 - 1 - 1 - 1 - 1 - 1 - 1 - 1 - 1 -	, .7.7
Do 52-10	and belts and & notice of motion for order extending time for filing o	10, 4, 1
M. 2547	Filed Memo Endorsed on motion by deficit for	7.75
- 4		* VA * 1
12- 70		
	Piled Pltff's affdyt & notice of motion to extend time for filing a pre-trial	5.
12- 70	FILEU Memo Endorsed on most on	
	mirphy. J (matled) notice)	
12-70	Filed Defts affdyt & notice of motion ret 11-12 70 for	1- 1
9-72	for filing pre-trial memorandum to 11-30-70. Motion dated 11-2-70.	
Mg M'	& that cause be restored to docket for Anni	5.0
-!	mandate & is is ordered that 68-1162 is consolidated with this action for tria	
	with respect to counterclaim on 68-1162 is hereby made an additional party	_
13 72	pltff in this action & caption of this action is amended as indicated-wyatt, J.	t .
夏 28 72		m/n
R 18 72	onierence continued.	- 1
	Court directs pre-trial order to be submitted for signature and filing on	(-)
.1.73		
2.1.73	Before Judge Robert L. Carter. Trial begun this date. (Non-Jury)	8
.2.73	Ariai Continued.	
r.5,73	Filed Transcript of record of proceedings, dated man 1 2 5 140 1833	. *

JUDGE CARTER

66 CIV \$15

Ma 16,73 Trial Continued.

20-74

Mar. 7,73 Trial Concluded. Decision Reserved. Pltff and Defts to file briefs by 3/20/73. Answering Briefs by April 2,73.

Mar-27-74 Filed OPINION #40509....for all the reasond indicated, the claims of plaintiff are dismissed; the counterclaims of the defendant Board as well as the counterclaim of the defendant Aetna, are also dismissed. The above constitutes the court's findings of fact and conclusions of law. So ordered. -- Carter, J. m/n

School District No. 2 of the Towns of Bedford, New Castle, North Castle and Pound Ridge, Mars Associates, Inc. and Normel Construction Corp. of New Rochells, a joint Venture, have judgment against the plaintiff, Fabrizio & Martin, Incorporated, dismissing the complaintiff and it is further ordered, that the counterclaims of the Board of Education and Aetna Casualty and Surety Co., be and they hereby are dismissed. - Clerk.

Filed transcript of record of proceedings dated 3-6-78
Filed transcript of record of proceedings dated 3-1-73
Filed transcript of record of proceedings dated 3-5-73
Filed transcript of record of proceedings dated 3-2-73
Filed transcript of record of proceedings dated 3-2-73
Filed transcript of record of proceedings dated 3-7-78
Filed transcript of record of proceedings dated 3-7-78

Filed deft./Central School District No.2 of the Towns of Bedford, New Castle, North Castle and Pound Ridge's notice of appeal to the USCA for the 2nd Circuit from final judgment dismissing the counterclaims entered in this action on 3-28-74 -- copies mailed to Hynes & Diamond, Esqs. and Max E. Greenberg, etal. (notice of appeal also by additional defendant Aetna Casualty & Surety Co.)

by add. deft. Aetna Casualty & Surety Co. from final judgment that/which denied Aetna Casualty and Surety Co. recovery on its counterclaim. - copies mailed to Louis E. Yavner, Esq. and Hynes & Diamond, Esqs.

from such part of final judgment entered on 3-28-74, which dismissed plaintiff's claims and complaint. - copies to Max Greenberg, Esq.

Filed notice of appearance of plaintiff by Fabrizio & Martin, Inc. by Burton M. Weinstein Esq. of Weinstein, Krulewitz & Weiner, llub Golden Hill St., Bridgeport, Conn.

(a member of the USCA.)

JUN 12-74 Filed Objections to Bd's request for findings and conclusion of law by Additional deft 4684

Jum :12-74 Filed Affidavit in Opposition to additional deft Aetna's claim that the deft Bd's reply 1540 be described by the Ct.

by a	dditional deft .	
N 12-74	Filed reply memo. of additional deft Aetna.	·
N 12-74	Filed Affidavit of Opposition to plaintiff Fabrizio's claim that the deft Bt'	s reply
N 12-74	Filed Affidavit of William D. Powers.	
M 12-74	Filed Affidavit in support of additional deft's Aetna's claim (filed by Geor Filed Post Trial Brief of plaintiff.	ge N. Topk
12-74	Filed Additional deft Aetma Cas. Post Trial Memo.	7.4
12-74	Filed plaintiff's reply to the Post-trial brief of deft.	70.8
12-74	Filed plaintiff's pre-trial memo.	7 1
22-74	Filed Deft's pre-trial memo.	
TI-M	Filed deft's amended pre-trial memo.	111
13070	Filed deft's Bd of Ed. Supplemental and amended answer to interrogatories.	40.
2-W	Filed deft's Bd of Ed. Amendment of Pre-trial order.	* * *
122-124	Filed request for findings of fact and conclusion of law of Bd of Ed.	11.
TIEN!	Filed deft's Bd of Ed. deft's post-trial memo.	134
112-79	Filed Appendix to deft's post trial memo.	
10-10	.Filed Deft's Bd of Ed. post trial reply memo. of law.	
1141	Filed Deft's Bd of Ed. designation of exhibits to be transmitted to U.S.C.A.	100
MATH	tiled notice that the record on appeal has been	1
	certified and transmitted to the U. S. C. t.	7.15.0
Art and a second	The Market of th	
4		
1. 5.		***
And . of		- 4
		12.2

CIVIL DOCKET 68 Civ. 1162

UNITED STATES DISTRICT COURT

68 'iv. 1162

Jury demand date: ARTER

TITLE OF	CASE				ATTORNEYS	
DISTRICT NO. 2 of	TION, CENTRAL SCHOO THE TOWNS OF BEDEORI CASTLE and POUND RI	D.	Louis	laintiff: E. Yavner '42nd S ₊ ., NY	C.,10017(YU 6-2 2 5
. VS.						
AETNA CASUALTY & SI	JRETY CO.,					
			For d	lefendant:		
			Reis 30 V	E. Greenberg, s & Blasky esey St., NYC.	,10007(26	7-5700)
STATISTICAL RECORD	COSTS		DATE	NAME OR RECEIPT NO.	REC.	
J.S. 5 mailed x	Costs		DATE 8-2/68.		14-	
	Clerk			RECEIPT NO.		N 5
J.S. 5 mailed x Oscal 3-27-74	Clerk -1 Marshal S Docket fee			CHANKER LISTRICE LYNDRER	14-	N 5
J.S. 5 mailed X Consell 3 27.74 J.S. 6 mailed	Clerk			CHANKER LISTRICE LYNDRER	14-	<i>N</i> 5

· ;

		. :
DATE	PROCEEDINGS	Date Ord Judgment
lar.21468	Filed petition & record on removal from Supreme court, State of N.Y., County of	
	Filed Undertaking on removal \$500, by The Standard Fire Ins. Co., by James P. Quinn	
Mar 21-68	Filed deft's affdvt. of service by mail of notice of removal on pltff. Filed deft's notice of filing of petn. & bond on removal	- :
	Filed stipulation and order extending plaintiff's time to serve complaint to 12/2/68. So ordered. MacMahon, J.	*7
Be-4-68	Filed stipulation and order extending plaintiff to serve complaint to 12/18/68. So ordered, Croake, J.	1.0
ec. 26-68	Filed stipulation and order extending plaintiff's time to serve complaint to 2/21/69. So ordered. Frankel, J.	
iar. 3.69	Filed stip and order that time for pltff to serve a complaint is extanded form Feb. 21.69 to 3.14.69 Canella, J.	
126	Filed Stipulation and order extending defendant's time to answer to 5/2/69. So	
	ordered. Tyler, J. 9 Filed stip and order time for deft. to serve its answer is ext.	100
	from 5-2-69 to 7-2-69 so ordered Lasker, J.	-
ug .29-6	9 Filed stip and order that deft's time to serve enswer is extended from 7-2-69 to 9-12-69. So OrderedMcLean, J.	-
ct.10-6	Filed stip and order that deft's time to serve answer is extended from 9-12-69 to 10-16-69. So Ordered Ryan, J.	85
t.15-69	- Filed ANSWER of defts	GTH(B
	Filed pltff's affidavit and notice of motion for jury demand, ret. + 12-2-69.	
v. 26-69	Filed affidavit in opposition by George N. Toplitz to pltff's motion Filed deft's memorandum of law in opposition to pltff's motion.	•
10.16-69	The motion is granted. So Ordared-Frenkel J.	
	ret. 2-3-70.	12500
*1.37	Filed memorandum in support of motion for summary judgment.	A. 154
30 55 OF	Filed stip that motion now ret. 2-3-70 be adjourned to 3-3-70.	
0.18-70	Filed pltff's affidavit and notice of motion for summary judgment ret. 3-3-70.	+
11-70	Filed in Court deft's reply memorandum in support of motion for summary Judgment Filed Coinion # 3677h - Deft's motion for support indement is granted. Clerk "	45 A
	Filed Spinion # 3677h - Deft's motion for suremany judgment is granted. Clerk is directed to enter judgment in favor of Caft Actns Casualty & Surety Co. dismissing action-So ordered-Myatt, J. m/n	
17-70	Filed reply affdyt of Albert Dana	
y 11-70	Filed name endorsed on motion filed 2-18-70Pltff's motion for summery judgment in denied for reasons given in Colmica-So ordered-Myatt.J. m/n	
7 12-70	Filed Judgment - Ordered that deft have judgment coainst pltff dismissing comple Judg ent-Clerk m/n ent 5-13-70	int
	Filed pltff's notice of appeal to USCA - mailed dopy to Max E. Greenberg, Trayman, Harris, Cantor, Reiss & Blacky	21 1
pr 8-71	Filed pltff's notice pursuant to rules of appellate procedure to include on record on appeal certain documents	d
7 16-71 For 11 70	Filed Counter designation pursuent to rules of suppliate procedure. Rule 10b Filed Pitff's memorandum of law in opposition to option of deft and in support	4
Apr 29-71	of cross-motion of pitff. (Theored on dear t 4-20-71) Filed notice of certification of record on special to USCA	17
Jan 19-	2 Filed true copy of USCA order & opinion that judgent of USDC as to appellant's 13 reversed & action remarked to Dist. Ct. will costs taxed against appelled to	comple
	\$052.35 & Docketed as Jugant #72,169 ct 12 19-72 m/n. (Cont. 2 19 2)	

JUDGE BRIEANT

-	The state of the s
DATE	PROCEEDINGS
Feb 9-72	Filed ORDER that judgment of this Court filed 5-12-70 is vacated & set aside, &
eb 9-12	the toward to docket for further proceedings in accordance with
	mandate & it is ordered that this action is consolidated with 66-2935 for tria purposes & that deft Aetna in this action is made an additional partywith rest to counterclaim of deft Board of Education in action 66-2935 & against pltff i
Mar1-73	66-2935 & caption of this action is amended in 66-2935 as incicated-Wyatt, J.m/ Trial begin & continued before Carter J. without a jury.
Mar 2-73	Trial cont.
Mar 5-73	Trial cont.
Mar 6-73	Trial cont. & concluded (5 days) decision reserved. Pltffs & defts to file brief
Mar 7-73	3/20/73, answering briefs by April 2, 1973.
Mar-27-74	Filed OPINION #40509 for all the reasons indicated, the claims
	of plaintiff are dismissed: the counterclaims of the defend
	Board, as well as the counterclaims of the defendant Aetna,
	are also dismissed. The above constitutes the court's finds
	of fact and conclusions of alw. So ordered Carter, J. m.
	(filed in 66 CIV 2935)
Mar-28-7	Filed JUDGMENT dismissing the complaint (judgment against the plt
riat - 20 /	see 66 Civ 2935) and it is further ordered that the counterc
	of the Board of Education and Aetna Casualty and Surety Co.
	dismissed Clerk m/n
	Tu I will the same to answer the transfer of the
G-17.74	Filed notice that the record on appeal has been certified
	& tressmitted to the U.J. C. 4.

PLAINTIFF, FABRIZIO AND MARTIN, INC. COMPLAINT (Filed September 13, 1966)

FABRIZIO & MARTIN, INCORPORATED, Plaintiff

U8.

THE BOARD OF EDUCATION CENTRAL SCHOOL DISTRICT NO. 2 OF THE TOWNS OF BEDFORD, NEW CASTLE, NORTH CASTLE AND POUND RIDGE, MARS ASSOCIATES, INC. and NORMEL CONSTRUCTION CORP. OF NEW ROCHELLE, a joint venture,

Defendants

Plaintiff, Fabrizio & Martin, Incorporated, by its attorney, Leslie A. Hynes, Esq., complaining of the defendants, alleges:

As and for a First Cause of Action Against the Defendant, the Board of Education Central School District No. 2

First: That at all times hereinafter mentioned plaintiff, Fabrizio & Martin, Incorporated, (hereinafter sometimes called the "Prime Contractor") was and still is a foreign corporation organized and existing under and by virtue of the laws of the State of Connecticut with its principal office and place of business at 1028R Post Road, Darien, Connecticut.

Second: That on information and belief, defendant, Board of Education Central School District No. 2 of the Towns of Bedford, New Castle, North Castle and Pound Ridge (hereinafter sometimes called the "Board") was and still is a municipal corporation duly organized and existing under and by virtue of the laws of the State of New York with its principal office at 369 Lexington Avenue, Mount Kisco, New York.

THIRD: That the matter in controversy, exclusive of interest and costs, exceeds \$10,000.00 and is between citizens of different states and jurisdiction of this action thereby arises under the provisions of Title 28, U.S.C., Section 1332, as amended.

FOURTH: That more than thirty days prior to the commencement of this action and within three months after their accrual, the plaintiff duly presented written verified claims to defendant setting forth the claims stated herein, and defendant Board has neglected or refused to make adjustment or payment thereof.

FIFTH: That on or about March 17, 1964, the Prime Contractor and Board entered into an agreement in writing whereby the Prime Contractor agreed to furnish the materials and perform the general construction and site work for the Bedford Middle School located in the Town of Bedford, State of New York, which agreement, together with all plans, specifications and other documents forming a part thereof and addenda and supplements thereto (hereinafter referred to as the "Prime Contract") is incorporated herein by reference and made a part hereof as though fully set forth at length herein, and plaintiff begs leave to refer to said Prime Contract for all of its terms and provisions as the same may be produced upon the trial of this action.

Sixth: That after the making and execution of the Prime Contract, and as soon as directed by the defendant, its agents, servants and representatives so to do, the Prime Contractor proceeded to carry out and perform all of the terms and conditions of said Prime Contract on its part to be carried out and performed, except as performance thereof was interfered with, impeded, hindered and changed by the acts of defendant, its agents, servants and representatives, and except as further performance thereof was prevented by the unlawful and improper termination of the Prime Contract by defendant, as hereinafter alleged.

SEVENTH: That plaintiff, prior to the termination of the Prime Contract, performed work, labor and services and furnished material and equipment to the defendant having an agreed price and reasonable value of at least \$2,429,976.19.

Eighth: That by reason of the matters alleged aforesaid, defendant became indebted to plaintiff in the sum of \$2,429,976.19, no part of which has been paid although duly demanded, except the sum of \$2,120,756.91 leaving a balance due and owing to plaintiff of \$309,219.28.

As and for a Second Cause of Action Against Defendant, the Board of Education Central School District No. 2:

NINTH: Plaintiff repeats and realleges each and every allegation stated and contained in paragraphs "First" through "Sixth" inclusive hereof with the same force and effect as though fully set forth at length herein.

TENTH: That plaintiff, at the special instance and request of defendant, its agents, servants and employees, performed extra and additional work, labor and services and furnished extra and additional material having a fair and reasonable value of \$182,402.85.

ELEVENTH: That by reason of the matters alleged above, defendant became indebted to plaintiff in the sum of \$182,402.85, no part of which has been paid although duly demanded.

As and for a Third Cause of Action Against Defendant, the Board of Education Central School District No. 2:

Twelfth: Plaintiff repeats and realleges each and every allegation stated and contained in paragraphs

"First" through "Sixth" inclusive hereof with the same force and effect as though fully set forth at length herein.

THIRTEENTH: That the defendant failed to perform its obligations under the Prime Contract in that it failed to establish and to follow reasonable and normal progress schedules and work sequences; failed to coordinate and cause the work of other prime contractors and their subcontractors to conform to required job progress; failed to furnish and complete within reasonable times preliminary drawings, plans, approvals, and orders upon which plaintiff's work depended; failed to timely issue revised drawings and extra work orders upon which plaintiff's work depended; interfered with plaintiff's contractual arrangements with its excavation subcontractor; failed to make timely and proper payments to plaintiff; improperly and unlawfully deducted liquidated damages from payments due to plaintiff; failed to act upon plaintiff's requests for extensions of time; failed to furnish adequate and correct Prime Contract plans and failed to correct deficiencies in said plans and the demand therefor by plaintiff; and otherwise actively interfered with, disrupted, obstructed and unreasonably delayed plaintiff in the performance of its work under the Prime Contract.

FOURTEENTH: That solely as a result of the foregoing, the performance of the plaintiff's work under the Prime Contract was interfered with, disrupted, obstructed and delayed and was made unreasonably, abnormally and unforeseeably difficult and expensive, and the Prime Contractor was put to additional loss, cost, damage and expense in the amount of \$150,000.00

FIFTEENTH: That by reason of the matters alleged above, defendant became indebted to the plaintiff in the

14a

Complaint

sum of \$150,000.00, and no part of which has been paid although duly demanded.

As and for a Fourth Cause of Action Against Defendant, the Board of Education Central School District No. 2:

SIXTEENTH: Plaintiff repeats and realleges each and every allegation stated and contained in paragraphs "First" through "Sixth" hereof with the same force and effect as though fully set forth at length herein.

SEVENTEENTH: That while plaintiff was duly engaged in the performance of the terms and conditions of said Prime Contract on its part to be kept and performed, defendant on or about March 6, 1966, improperly, unlawfully and in breach of the Prime Contract, terminated the further performance thereof by the Prime Contractor.

EIGHTEENTH: That at the time of said termination and at all times subsequent thereto, plaintiff was ready, able and willing to complete its performance of the Prime Contract but was prevented from doing so by the defendant.

NINETEENTH: That by reason of the breach of the prime contract by defendant in the unlawful termination thereof, the plaintiff was deprived of the profits which it would have earned in the performance of the work remaining to be done under the said Prime Contract.

TWENTIETH: That by reason of the above, plaintiff was damaged in the sum of \$22,000.00.

As and for a Fifth Cause of Action Against Defendant, the Board of Education Central School District No. 2 and Mars Associates, Inc. and Normel Construction Corp. of New Rochelle, A Joint Venture:

TWENTY-FIRST: Plaintiff repeats and realleges each and every allegation stated and contained in paragraphs "First" through "Sixth", "Seventeenth" and "Eighteenth" hereof with the same force and effect as though fully set forth at length herein.

TWENTY-SECOND: That on information and belief Mars Associates, Inc. and Normel Construction Corp. of New Rochelle are domestic corporations organized and existing under and by virtue of the laws of the State of New York and doing business as a joint venture under the style and name of Mars-Normel, with its principal office in the County of Westchester, State of New York.

TWENTY-THIRD: That after the unlawful and improper termination of the Prime Contract as alleged heretofore, the defendant Board has refused and continues to refuse to permit plaintiff access to the job site.

TWENTY-FOURTH: That since the unlawful and improper termination of the Prime Contract as alleged heretofore, defendant Board has threatened to have personnel of the plaintiff arrested if they attempted to go on the job site to recover and remove the materials, tools and appliances that plaintiff had on the job site at the time its contract was so terminated.

TWENTY-FIFTH: That on information and belief, the defendant Joint Venture is and has been using the materials,

tools and appliances that defendant Board refused to permit plaintiff to remove from the job site as aforesaid.

TWENTY-SIXTH: That the defendants are in possession of and wrongfully detain from plaintiff, materials, tools and appliances described in Schedule "A" annexed hereto and made a part hereof, and of the value of \$66,904.02.

TWENTY-SEVENTH: Before the commencement of this action the defendants refused and continues to refuse to surrender the materials, tools and appliances described in Schedule "A" hereto, all to plaintiff's damage in the sum of \$66,904.02.

TWENTY-EIGHTH: That by reason of the above, plaintiff Prime Contractor was damaged in the sum of \$66,904.02.

As and for a Sixth Cause of Action Against Defendant, the Board of Education Central School District No. 2:

TWENTY-NINTH: Plaintiff repeats and realleges each and every allegation stated and contained in paragraphs "First" through "Fourth" inclusive hereof with the same force and effect as though fully set forth at length herein.

THIRTIETH: That heretofore and between the 17th day of March, 1964 and the 8th day of March, 1966, plaintiff at the special instance and request of defendant, performed work, labor and services and furnished materials in the construction of the Bedford Middle School upon premises owned by the defendant in the Town of Bedford, State of New York, which work, labor, services and materials were reasonably worth the sum of \$2,762,379.04.

THIRTY-FIRST: That as a result of the foregoing, there became justly due and owing to the plaintiff from the defendant the sum of \$2,762,379.04, no part of which has been paid although duly demanded, except the sum of \$2,120,756,91, leaving a balance due and owing to plaintiff of \$641,622.13.

Wherefore, plaintiff Fabrizio & Martin, Incorporated demands judgment against the defendant Board of Education, Central School District No. 2 in the sum of \$309,-219.28 on the first cause of action; \$182,402.85 on the second cause of action; \$150,000.00 on the third cause of action; \$22,000.00 on the fourth cause of action; \$66,904.22 on the fifth cause of action and \$641,622.13 on the sixth cause of action, and against the defendant joint venture, Mars-Normel the sum of \$66,904.02 on the fifth cause of action, all together with interest on said amounts from the dates when due, together with costs and disbursements of this action.

/s/ Leslie A. Hynes
Attorney for Plaintiff,
Fabrizio & Martin, Incorporated
Office & P. O. Address
50 Broadway
New York, New York 10004

(Verified.)

SCHEDULE "A" ANNEXED TO FOREGOING COMPLAINT 18a

Demodule /L		
Muller Mortar Mixer	\$	525.00
Three Diamond Blades		422.00
One Skill Saw No. 127		325.00
Two Stow Vibrators		690.00
Nails—12 Kegs at \$16.00		192.00
Six Shovels—short handles		
20,500 Snap Ties for Forms		28.32
One Hose Suction 2" x 20	2	255.00
		44.25
Kelly Power Buggy No. 26244		973.00
One West Brick Buggy	1	780.00
One West Half Buggy No. 102		525.00
Two West Mortor Buggy		318.00
Three Brick Clamps		9.75
Three Thor Vibrators Model CU3 (motor in head)		
		005.00
19 Shovels—Long handle		114.00
Two Wacker Rammer 875.00 each	. 13	750.00
One Hose Suction20'2"		40.05
One Discharge Hose WS T Rainger		32.20
One Kumalong No. 16-105		20.00
6 Pr. No. 4 Adj. Jacks	ç	91.80
24 Mortar Pans at 4.20 each		98.40
24 Mortar Pans Stands at 4.50 each	1	09.00
40 Pr. Adj. Jacks at 15.30	6	12.00

19a

4 Propane Heaters	100.49
One Master Oil Heater 250,000 BTU.	675.00
Six Chisels	20.30
12 Wheel Barrows at 27.75	333.00
3 Mixing Boxes	105.00
8 Bull Points	17.34
Safway Base Plates	28.80
½" Rope 200'	10.05
3/4" Rope 100'	10.20
Poly Film—20 Rolls 18.72	374.40
One Target Masonry Saw	631.99
Two Box	92.00
One Suction Hose 3" x 20	72.00
One Discharge Hose 2 x 50	29.50
12 Boots, 12 Aprons, 12 Hammers at 6.00	102.00
20 15' x 20 Tarps	465.00
3 8-88 Concrete Carts	310.00
2 Darby (Concrete)	80.00
One Grinder with Parts	320.13
One Trailer Shanty on Wheels	650.00
2010 Ty Holders	450.75
3 Length Water Hose 3/4 x 50	36.00
2 Sledge Hammers	52.00
8 Rain Suits	39.60

20a

72.00 320.00 325.00 38.70
325.00
38 70
00.10
890.00
875.00
350.00
1,500.00
2,000.00
3,600.00
1,000.00
1,000.00
1,350.00
1,500.00
10,000.00
3,800.00
350.00
30.00
3,000.00
135.00
875.00
380.00
85.00

21a

	\$66,904.02
Atlas Accessories	1,200.00
102 Adj. Jacks Waco. at 16.00	1,632.00
Misc. Small Tools & Parts, Saws, Picks, Bolt Cutters, and etc.	650.00
1 Cement Finisher (Gas)	370.00
18 Hammers	70.00
220 Walk Thru Steel Scaffolds w/Braces, etc.	5,500.00
102 Steel Safeway Scaffolds w/Braces	3,000.00
250 Scaffold Brackets	900.00
13 Hard Hats	52.00
136 Buck-Ups at 8.00	1,088.00
Two Vibor. Vibrators (Concrete)	700.00
4 Scaffold with Wheels	48.00
Jig Saw No. 320	69.00
6 New H.D. Concrete Carts	620.00
12 Ripping Bars	60.00
8 Concrete Chutes	560.00
Two Steel Tapes	79.00
Two 50 Gal. Oil	150.00
One Thor Vibrator (SIP Motor)	340.00
One Mud Sucker Pump	370.00
One Flame Thrower	89.00
Three Ice Choppers HD	18.00

22a DEFENDANT'S ANSWER (Filed August 11, 1967)

[SAME TITLE]

FOR A FIRST DEFENSE, THE DEFENDANTS ALLEGE

1. Each of the causes of action alleged in the complaint fails to state a claim against defendants upon which relief can be granted.

FOR A SECOND DEFENSE

A. As to the First Cause of Action, Defendant Board:

- 2. Denies each and every allegation contained in paragraph "Second" of the complaint, except that it admits that it is a Board of Education organized and existing under and by virtue of the Education Law of the State of New York, and that its principal office is at 369 Lexington Avenue, Mount Kisco, New York.
- 3. Denies each and every allegation contained in paragraph "Third" of the complaint, except that it admits that the matter in controversy exceeds \$10,000.00, and it specifically denies that it is a citizen of the State of New York or of any other state, denies that there is diversity of citizenship between the plaintiff and itself, and denies the jurisdiction of the Court in this case.
- 4. Denies each and every allegation contained in paragraph "Fourth" of the complaint, except that it admits that the plaintiff presented to it certain writings purporting to be notices of claim, and that more than 30 days have elapsed since said presentments.
- 5. Denies each and every allegation contained in paragraph "Sixth" of the complaint, and specifically denies

that the plaintiff duly performed all the conditions of such contract on its part to be performed in that the plaintiff failed, neglected, omitted and refused: to perform and complete the work in accordance with and as required by the contract; to give due and timely notice in accordance with and as required by the contract, of conditions causing delay or of conditions affecting the prompt performance of the work; to perform the work in a satisfactory workmanlike manner and in a manner so as to avoid delay and to avoid the creation of conditions which caused delay and which impeded and interfered with the prompt and proper performance of the work; to coordinate the work under its contract with the work of other contractors working at the same job site as required by and provided for by the contract; to comply with and abide by the contract provisions authorizing the plaintiff to seek damages, if any, for alleged delay, against other contractors working at the same job site who are or might be responsible for causing said delays; to comply with the terms and conditions of the contract relating to extra or disputed work, and to the performance thereof, and to the giving of written notice in connection therewith, and to the request for a final determination thereon; to protest the performance of alleged extra or disputed work as required by the contract; to submit a final verified statement, within the time provided for by the contract, describing all alleged claims in any way connected with or arising out of this contract, in default of which such claims are waived as provided for by the contract; and otherwise failed, neglected, omitted and refused to comply with and abide by the terms and conditions of the contract as more fully set forth in the defenses herein.

24a

Answer

6. Denies each and every allegation contained in paragraphs "Seventh" and "Eighth" of the complaint.

B. As to the Second Cause of Action, Defendant Board:

- 7. Repeats each and every denial, as hereinbefore set forth, to each and every allegation contained in the paragraphs of the complaint which are realleged in paragraph "Ninth" thereof.
- 8. Denies each and every allegation contained in paragraphs "Tenth" and "Eleventh" of the complaint.

C. As to the Third Cause of Action, Defendant Board:

- 9. Repeats each and every denial, as hereinbefore set forth, to each and every allegation contained in the paragraphs of the complaint which are realleged in paragraph "Twelfth" thereof.
- 10. Denies each and every allegation contained in paragraphs "Thirteenth," "Fourteenth" and "Fifteenth" of the complaint.

D. As to the Fourth Cause of Action, Defendant Board:

- 11. Repeats each and every denial, as hereinbefore set forth, to each and every allegation contained in the paragraphs of the complaint which are realleged in paragraph "Sixteenth" thereof.
- 12. Denies each and every allegation contained in paragraphs "Seventeenth" to "Twentieth," inclusive.

E. As to the Fifth Cause of Action:

- 13. Defendant Board repeats each and every denial, as hereinbefore set forth, to each and every allegation contained in the paragraphs of the complaint which are realleged in paragraph "Twenty-First" thereof, except that it specifically denies that the matter in controversy exceeds \$10,000.00; and defendant Mars-Normel denies each and every allegation contained in paragraphs "Second" and "Third" of the complaint, except that it admits diversity of citizenship between plaintiff and itself, and alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs of the complaint numbered "Fourth", "Sixth", "Seventeenth" and "Eighteenth."
- 14. Defendant Board denies each and every allegation contained in paragraphs "Twenty-Third" and "Twenty-Fourth" of the complaint, except that it admits that it refused to allow plaintiff's employees to remove materials, tools, and appliances from the job site; and defendant Mars-Normel alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in said paragraphs of the complaint.
- 15. Defendant Board denies each and every allegation contained in paragraphs "Twenty-Fifth" to "Twenty-Eighth," inclusive, except that it admits that plaintiff left certain materials, tools and appliances on the job site, denies that the description, quantity and reasonable value thereof are as set forth in Schedule A annexed to the complaint, and alleges that it duly permitted defendant Mars-Normel to use certain materials, tools and appliances in accordance with the terms and provisions of

the contract between plaintiff and defendant Board; defendant Mars-Normel denies each and every allegation contained in paragraphs "Twenty-Fifth" to "Twenty-Eighth," inclusive, of the complaint, except that it admits that it has used certain materials, tools and appliances provided to it by the defendant Board in accordance with the terms and provisions of the contract duly entered into by and between defendant Board and defendant Mars-Normel for the completion of the contract between defendant Board and plaintiff, denies that it ever refused to return such materials, tools and appliances to plaintiff, and alleges that no demand of any kind was ever made upon defendant Mars-Normel by plaintiff or anyone in its behalf making claim for, or demanding the return of, or alleging ownership or right of possession of any materials, tools and appliances used by defendant Mars-Normel in performing its contract with the defendant Board or in any other connection.

F. As to the Sixth Cause of Action, Defendant Board:

- 16. Repeats each and every denial, as hereinbefore set forth, to each and every allegation contained in the paragraphs of the complaint which are realleged in paragraph "Twenty-Ninth" thereof.
- 17. Defendant Board denies each and every allegation contained in paragraphs "Thirtieth" and "Thirty-First" of the complaint, except that it admits that the plaintiff and itself entered into a written contract executed by the parties on March 17, 1964, and that it paid the plaintiff thereon the sum of \$2,131,859.00.

FOR A THIRD DEFENSE, THE DEFENDANT BOARD ALLEGES:

18. The Court lacks jurisdiction of the subject matter of this action for the reason that the matter involved

herein is not a controversy between citizens of different states in that the defendant Board is not a citizen of the State of New York or of any other state; the defendant Board is an agency of the State of New York, which, though nominally not a party defendant, is, nevertheless, in truth and in fact, the real defendant, and therefore there is no diversity of citizenship herein.

19. This action is barred by the provisions of the 11th Amendment of the Constitution of the United States, which provides that the judicial power of the United States "shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

20. By reason of the foregoing, this Court should decline to take jurisdiction of the subject matter of this action.

FOR A FOURTH DEFENSE AND BY WAY OF COUNTERCLAIM, DEFENDANT BOARD ALLEGES:

21. On or about March 17, 1964, the plaintiff and defendant Board entered into an agreement in writing whereby the plaintiff agreed to furnish the materials and perform the general construction and site work for the Bedford Middle School located in the Town of Bedford, State of New York, which agreement, together with all plans, specifications and other documents forming a part thereof and addenda and supplements thereto (hereinafter referred to as the "Prime Contract") is incorporated herein by reference and made a part hereof as though fully set forth at length herein, and defendant Board begs leave to refer to said Prime Contract for all of

its terms and provisions as the same may be produced upon the trial of this action.

- 22. Section 103(1) of the New York General Municipal Law provides, in pertinent part, as follows:
 - "... all contracts for public work involving an expenditure of more than twenty-five hundred dollars... shall be awarded by the appropriate officer, board or agency of a political subdivision... to the lowest responsible bidder furnishing the required security after advertisement for sealed bids in the manner provided by this section."
- 23. The definition of a "political subdivision" in Section 100(1) of the General Municipal Law includes a school district. Section 2513 of the New York Education Law makes a school district specifically subject to Section 103 of the General Municipal Law. Section 15 of the New York Public Works Law contains a similar provision, which also covers a school district.
- 24. A contract made by a board of education in violation of the competitive bidding requirement of these sections is illegal and void.
- 25. Heretofore, and after the commencement of this action, defendant Board moved to stay the action and to compel arbitration. The motion (Motion No. 86 on February 21, 1967) came before District Judge McLean who set it down for hearing on the question of the validity of the contract. Following a hearing held on June 26 and 27, 1967, Judge McLean held and ordered in an opinion dated July 6, 1967, in which he denied the motion, that the said Prime Contract

"was not awarded in compliance with Section 103(1) of the General Municipal Law. It is therefore void. It follows that the arbitration clause contained in that contract is invalid." (Opinion, p. 22)

26. In a companion opinion dated July 6, 1967, denying a motion for intervention in this action by Aetna Casualty and Surety Company, Judge McLean stated (at page 1):

"By separate opinion filed herewith, I have denied the motion of defendant Board of Education on the ground that the contract is illegal and void."

- 27. By reason of the foregoing, the said Prime Contract was when made and now is void and of no effect.
- 28. No payment whatsoever may be made by defendant Board to plaintiff, either under the said Prime Contract or on quantum meruit for the value of the work, labor and materials.
- 29. By a series of 21 requisitions dated from April 29, 1964 to February 14, 1966, plaintiff charged defendant Board and was paid by defendant Board a total of \$2,131,859.00.
- 30. Each of the said charges made by the plaintiff was a charge for one or more illegal, unjust and inequitable claims, demands or expenses against defendant Board; the services, if any, for which each of said charges was made by the plaintiff were not legally chargeable against defendant Board; defendant Board never acquired or had jurisdiction to audit or allow any of such charges; the audit and allowance of each of said charges by said de-

fendant Board, and the payment of the amounts thereof to the plaintiff by defendant Board, were ultra vires, illegal and void.

31. By reason of the foregoing facts, the funds and estate of the said defendant Board have suffered waste and injury, and the said defendant Board has been damaged in the sum of \$2,131,859 with interest on each of the 21 payments made by defendant Board to plaintiff from the date of each such payment to date.

FOR A FIFTH DEFENSE AND BY WAY OF COUNTERCLAIM DEFENDANT BOARD ALLEGES:

- 32. It does hereby incorporate and adopt by reference all of the allegations set forth in paragraph 21 of this answer.
- 33. It paid to plaintiff and plaintiff received and accepted from the defendant all moneys due, owing and payable under said contract and in accordance therewith.
- 34. The aforesaid Prime Contract between plaintiff and defendant Board contains, among others, articles in its General Conditions that provide for defendant Board to make changes in the work and for plaintiff to give written notice to the Architect of extra cost therefor within a reasonable time (Articles 15 and 16); for plaintiff to give written notice to the Architect for claims for extension of time for delays for certain causes (Article 18); for plaintiff to remedy defects due to faulty materials or workmanship (Articles 19 and 20); for defendant Board after due notice, to make good deficiencies of the plaintiff (Article 21); for defendant Board, in the event of substantial violation of the contract by plaintiff, upon the Architect's certificate that sufficient cause exists to

3

Answer

justify such action, to terminate plaintiff's employment "and take possession of the premises and of all materials, tools and appliances thereon and finish the work by whatever method [it] may deem expedient . . ." (Article 22) the Architect may withhold payments from the plaintiff under certain circumstances (Article 26); for a party to the contract that suffers damages because of the other's wrongful act to make written claim therefor within a reasonable time, which claim shall be adjusted by agreement or arbitration (Article 31); the Architect shall, within a reasonable time, make decisions on all claims of either party, which decisions shall be subject to arbitration, which shall be demanded in writing, and during which plaintiff shall not cause a delay of the work (Article 40).

35. Thereafter the plaintiff commenced work under said contract.

36. Thereafter and prior to January 1965 plaintiff failed to perform the conditions of said contract on its part to be performed in that it failed, neglected, omitted or refused: to perform and complete the work in accordance with and as required by the contract; to give due and timely notice, in accordance with and as required by the contract, of conditions causing delay or of conditions affecting the prompt performance of the work; to perform the work in a satisfactory workmanlike manner and in a manner so as to avoid delay and to avoid the creation of conditions which caused delay and which impeded and interfered with the prompt and proper performance of the work; to coordinate the work under its contract with the work of other contractors working at the same job site as required by and provided for by the contract; to comply with and abide by the contract provisions au-

thorizing the plaintiff to seek damages, if any, for alleged delay, against other contractors working at the same job site who are or might be responsible for causing said delays; to comply with the terms and conditions of the contract relating to extra or disputed work, and to the performance thereof, and to the giving of written notice in connection therewith, and to the request for a final determination thereon; to protest the performance of alleged extra or disputed work as required by the contract; to submit a final verified statement, within the time provided for by the contract, describing all alleged claims in any way connected with or arising out of this contract, in default of which such claims are waived as provided for by the contract; and otherwise failed, neglected, omitted and refused to comply with and abide by the terms and conditions of the contract as more fully set forth in the defenses herein.

- 37. Thereafter and in or about January 1965 defendant Board duly gave notice to plaintiff of its intent to terminate the said Prime Contract.
- 38. Thereafter and on or about March 23, 1965 plaintiff and defendant Board entered into a Supplemental Agreement which is incorporated herein by reference and made a part hereof as though fully set forth at length herein, and defendant Board begs leave to refer to said Supplemental Agreement for all of its terms and provisions as the same may be produced upon the trial of this action.
- 39. Pursuant to said Supplemental Agreement the plaintiff agreed to promptly resume performance of work and to substantially complete the balance of work on or before certain dates specified for particular buildings, failing which, plaintiff agreed to pay specified liquidated

damages, which the defendant Board was authorized to deduct from any amounts becoming due to plaintiff. The aforesaid Prime Contract contained no provision for liquidated damages.

- 40. Plaintiff also released the defendant Board, by the Supplemental Agreement, from claims or causes of action for alleged damages suffered prior to the date of said Agreement, except for extra work; and it agreed to indemnify defendant Board from certain claims by others.
- 41. The New York Education Law, Section 3813, provides in substance that no action relating to district property or claims against the district, shall be prosecuted or maintained against any school district or board of education, unless a written verified claim was presented to the board within three months after the accrual of such claim.
- 42. Defendant Board fully performed all the conditions both of said Prime Contract and of the Supplemental Agreement on its part to be carried out and performed, except as performance thereof was interfered with, impeded, hindered, and changed by actions of plaintiffs, its agents, servants, and representatives, and except as further performance thereof was prevented by plaintiff's unlawful and improper default, as hereinafter alleged.
- 43. In or about the first week of March 1966 plaintiff walked off the job and refused to do any more work.
- 44. Thereupon defendant Board duly demanded that plaintiff perform the conditions of said Prime Contract and of the Supplemental Agreement on its part to be performed.

- 45. Plaintiff refused to return to work.
- 46. Thereupon defendant Board duly served upon the plaintiff notices of intent to terminate and of termination of the Prime Contract and of the Supplemental Agreement.
- 47. Plaintiff failed, neglected, omitted and refused to make written, itemized and duly verified statements of claims, as provided by law and by the Prime Contract, and failed to seek the remedies provided by the Prime Contract for alleged claims, including requests for determinations by the Architect and arbitration of Architect's determinations.
- 48. By reason of the foregoing, plaintiff's claims for damages have been conclusively cancelled, and in consequence thereof plaintiff is not entitled to any payment and may not maintain this action.
- 49. In and by the aforesaid Prime Contract and Supplemental Agreement it was provided that the several building units of the said Middle School were to be substantially completed on or before certain dates, as specified for each of said building units, and the completion of each said building unit on or before that date was expressly made a condition of the said Supplemental Agreement and a part of the consideration for which plaintiff was to be paid the price set forth therein; and the plaintiff agreed to pay certain sums to defendant Board as the liquidated damages that it would suffer by reason of plaintiff's delay and default.
- 50. Plaintiff breached the said Prime Contract and Supplemental Agreement, and did not have the said build-

ing units substantially completed on or before the dates due for each, and substantial completion was thereby reasonably delayed.

51. By reason of the foregoing, substantial completion of the building units comprising Middle School was delayed, and defendant Board was compelled to and did complete said job itself, and to employ the services of others in completing the same, and all to its damage in the sum of \$410,000.00.

FOR A SIXTH PARTIAL DEFENSE TO THE FIRST, SECOND, THIRD, FOURTH AND SIXTH CAUSES OF ACTION, DEFENDANT BOARD ALLEGES:

- 52. It does hereby incorporate and adopt by reference all of the allegations set forth in paragraph 21 and 33 through 40, inclusive, of this answer.
- 53. Pursuant to said Supplemental Agreement the plaintiff did release the defendant Board from any and all claims or causes of action for damages sustained or incurred by the plaintiff prior to the date of the execution of said agreement, subject to certain exceptions, limitations and conditions as set forth in said agreement.
- 54. Upon information and belief, the claims alleged by plaintiff are among the matters of which defendant Board was released by plaintiff under the said Supplemental Agreement.

FOR A SEVENTH DEFENSE TO THE FIFTH CAUSE OF ACTION:

55. Defendant Board alleges that in doing the acts complained of in the fifth cause of action of the complaint,

it was duly authorized by, and acted under the authority of the provisions of the Education Law and the General Municipal Law of the State of New York, and in accordance with the provisions of the aforesaid Prime Contract and of the Supplemental Agreement.

56. Defendant Mars-Normel alleges that it duly entered into a valid agreement with the defendant Board for the completion of the aforesaid Middle School, which agreement required defendant Mars-Normel to use certain materials, tools and appliances, to be supplied by the defendant Board, in the course of said completion work, which agreement together with all plans, specifications and other documents forming a part thereof is incorporated herein by reference and made a part thereof as though fully set forth at length herein, and defendant Mars-Normel begs leave to refer to said agreement for all of its terms and and provisions as the same may be produced upon the trial of this action.

57. Defendant Mars-Normel further alleges that upon information and belief plaintiff had full notice and knowledge of all the facts and the acts of defendant Board in advertising and letting after competitive bidding the said completion contract, and the terms and provisions thereof, of the award of said completion contract to defendant Mars-Normel, of defendant Mars-Normel's use of certain materials, tools and appliances provided by and as required by defendant Board, which the defendant Board represented to be in its lawful possession, and nevertheless wholly failed and neglected to and refrained from making any demand upon defendant Mars-Normel for the return to plaintiff of any of said materials, tools and appliances, and from serving any notice upon defendant

Mars-Normel of any claim that it made to possession of any of said materials, tools or appliances, until commencing this action shortly before defendant Mars-Normel substantially completed its said completion contract, and permitted defendant Mars-Normel to use said property, and that plaintiff has thereby been guilty of such laches as should in equity bar the plaintiff from maintaining this fifth cause of action, and has thereby duly ratified and confirmed in all respects defendant Mars-Normel's use of said materials, tools and appliances, and is thereby estopped to assert said fifth cause of action against defendant Mars-Normel.

WHEREFORE, defendants demand judgment as follows:

Defendant Mars-Normel demands judgment dismissing the fifth cause of action contained in the complaint herein; and

Defendant Board demands judgment dismissing each cause of action contained in the complaint herein and further demands judgment against the plaintiff upon the Fourth Defense by Way of Counterclaim for the sum of \$2,131,859.00 with interest thereon from the date of each payment made to plaintiff, as alleged therein, and upon the Fifth Defense by Way of Counterclaim for the sum of \$410,000.00 with interest thereon from March 7, 1966; and

Both defendants demand the costs and disbursements of this action.

Dated: New York, N. Y. August 8, 1967.

Louis E. Yavner
Attorney for Defendants
Office and P. O. Address
60 East 42nd Street
New York, N. Y. 10017

PLAINTIFF'S REPLY TO COUNTERCLAIM (Dated August 26, 1968)

[SAME TITLE]

Plaintiff, by its attorney, Leslie A. Hynes, Esq., for its Reply to the counterclaim contained in the Answer of defendants, alleges:

As to the Fourth Defense and Counterclaim

First: Admits that on or about March 17, 1964 the plaintiff and the Board of Education Central School District No. 2 of the Towns of Bedford, New Castle, North Castle and Pound Ridge (hereinafter called the "Board") entered into an agreement in writing (hereinafter referred to as the "Prime Contract") whereby plaintiff agreed to furnish the materials and perform the general construction and site work for the Bedford Middle School located in the Town of Bedford, State of New York as alleged in Paragraph "21" of the Answer. Plaintiff refers to said agreement and any and all documents incorporated therein by reference and all addenda thereto, and makes the same a part hereto with the same force and effect as though felly set forth at length herein for the exact terms and conditions of the Prime Contract. Plaintiff begs leave to refer to the same at the trial of this action.

SECOND: Admits the allegations stated and contained in Paragraph "22" of the Answer.

Third: Denies each and every allegation stated and contained in Paragraph "23" of the Answer. Plaintiff begs leave to refer to Section 100(1) of the General Municipal Law, Section 2513 of the New York Education

Law and Section 15 of the New York Public Works Law at the trial of this action for their exact terms.

FOURTH: Denies each and every allegation stated and contained in Paragraph "24" of the Answer.

FIFTH: Admits the allegations stated and contained in Paragraph "25" of the Answer, except plaintiff begs leave to refer to the opinion of Judge McLean dated July 6, 1967 for its exact language.

Sixth: Admits the allegations stated and contained in Paragraph "26" of the Answer except plaintiff begs leave to refer to the companion opinion of Judge McLean dated July 6, 1967 for its exact language.

Seventh: Plaintiff refers to the opinion of Judge Mc-Lean dated July 6, 1967 and makes the same a part hereof with the same force and effect as though fully set forth at length herein. For the exact language, findings and conclusions of said order plaintiff begs leave to refer to the same at the trial of this action. Except as hereter fore specifically admitted, plaintiff denies each and every allegation stated and contained in Paragraph "27" of the Answer.

Eighth: Denies each and every other allegation stated and contained in Paragraph "28" of the Answer.

NINTH: Admits that plaintiff received payments from defendant Board in the sum of \$2,120,756.91 from on or about April 29, 1964 to on or about February 14, 1966. Denies each and every other allegation stated and contained in Paragraph "29" of the Answer.

40a

Reply

TENTH: Denies each and every allegation stated and contained in Paragraph "30" of the Answer.

ELEVENTH: Denies each and every allegation stated and contained in Paragraph "31" of the Answer.

As to the Fifth Defense and Counterclaim

TWELFTH: Plaintiff repeats and realleges each and every answer and denial stated and contained in Paragraph "First" hereof with the same force and effect as though set forth at length herein.

THIRTEENTH: Admits that plaintiff received payments in the sum of \$2,120,756.91 from the defendant Board. Denies each and every other allegation stated and contained in Paragraph "3" of the Answer.

FOURTEENTH: Plaintiff refers to the Prime Contract and any and all documents incorporated therein by reference and all addenda thereto, including the General Conditions, and makes the same a part hereof with the same force and effect as though fully set forth at length herein. For the exact terms and conditions of the Prime Contract plaintiff begs leave to refer to the same at the trial of this action. Except as heretofore specifically admitted, plaintiff denies each and every allegation stated and contained in Paragraph "34" of the Answer.

FIFTEENTH: Admits that plaintiff commenced work on the construction of the Bedford Middle School subsequent to executing the Prime Contract. Denies each and every other allegation stated and contained in Paragraph "35" of the Answer.

SIXTEENTH: Denies each and every allegation stated and contained in Paragraph "36" of the Answer.

SEVENTEENTH: Admits that plaintiff received a purported notice of intention to terminate. Denies each and every other allegation stated and contained in Paragraph "37" of the Answer.

EIGHTEENTH: Admits that on or about March 23, 1965 plaintiff and defendant entered into an agreement. Plaintiff begs leave to refer to said agreement for all of its terms and provisions and makes the same a part hereto with the same force and effect as though fully set forth at length herein. Denies each and every other allegation stated and contained in Paragraphs "38" through "40" of the Answer.

NINETEENTH: Denies each and every allegation stated and contained in Paragraph "41" of the Answer. Plaintiff begs leave to refer to Section 3813 of the New York Education Law at the trial of this action for its exact terms.

TWENTIETH: Denies each and every allegation stated and contained in Paragraphs "42" through "45" of the Answer.

TWENTY-FIRST: Admits that defendant Board served upon plaintiff a purported notice of intent to terminate and of termination of the Prime Contract and the Agreement dated on or about March 23, 1965. Denies each and every other allegation stated and contained in Paragraph "46" of the Answer.

TWENTY-SECOND: Denies each and every allegation stated and contained in Paragraphs "47" and "48" of the Answer.

TWENTY-THIRD: Plaintiff refers to the Prime Contract and the Agreement for all of their terms and provisions and makes the same a part hereof with the same force and effect as though fully set forth at length herein. Except as heretofore specifically admitted, plaintiff denies each and every allegation stated and contained in Paragraph "49" of the Answer.

TWENTY-FOURTH: Denies each and every allegation stated and contained in Paragraphs "50" and "51" of the Answer.

As and for a First Defense to Counterclaims of Defendants

TWENTY-FIFTH: That the agreement entered into on or about March 23, 1965 between plaintiff and defendant Board grew out of and became an integral part of the Prime Contract, having no independent existence.

TWENTY-SIXTH: That by reason of the order of Judge McLean entered on July 6, 1967 holding the Prime Contract to be illegal and void, the agreement dated on or about March 23, 1965 is also illegal and void.

As and for a Second Defense to Counterclaims of Defendants

TWENTY-SEVENTH: That prior to the execution of the Prime Contract by plaintiff, defendant Board fraudulently and knowingly represented to and advised plaintiff that the Prime Contract and the method in which it was let complied with all applicable laws of the State of New York

and would, when executed, be a valid and legally binding contract.

TWENTY-EIGHTH: That plaintiff, relying on the truth of these representations, and believing them to be true, entered into the Prime Contract with the defendant Board.

TWENTY-NINTH: That by order dated July 6, 1967 Judge McLean held that the Prime Contract was not let to plaintiff in accordance with the competitive bidding requirements of Section 103(1) of the General Municipal Law of the State of New York and was, therefore, void. Plaintiff begs leave to refer to the order of Judge McLean at the trial of this action for its exact language.

THIRTIETH: 'That by reason of the above facts plaintiff sustained damages in the sum of \$2,762.379.04, no part of which has been paid, although duly demanded, except the sum of \$2,120,756.91, leaving a balance due and owing of \$641,622.13.

As and for a Third Defense to Counterclaims of Defendants

TWENTY-FIRST: That prior to the execution of the Prime Contract by plaintiff, defendant Board fraudulently and knowingly represented to and advised plaintiff that the Prime Contract and the method in which it was let complied with all applicable laws of the State of New York and would, when executed, be a valid and legally binding contract.

THIRTY-SECOND: That plaintiff, relying on the truth of these representations, and believing them to be true, entered into the Prime Contract with the defendant Board.

THIRTY-THIRD: That by order dated July 6, 1967 Judge McLean held that the Prime Contract was not let to plaintiff in accordance with the competitive bidding requirements of Section 103(1) of the General Municipal Law of the State of New York and was, therefore, void. Plaintiff begs leave to refer to the order of Judge McLean at the trial of this action for its exact language.

THIRTY-FOURTH: That by reason of its acts and conduct defendant Board is estopped from asserting that the Prime Contract is void and unenforceable.

As and for a Fourth Defense to Counterclaims of Defendants

THIRTY-FIFTH: That the the contract entered into between defendant Board and defendant Mars-Normel, as alleged in Paragraph "14" of the Answer is void and was not let in accordance with the laws of the State of New York.

Wherefore, plaintiff demands judgment dismissing the counterclaims of defendants and granting judgment to plaintiff, together with the costs of this action.

Dated: New York, New York August 26, 1968

Leslie A. Hynes
Attorney for Plaintiff
Office & P. O. Address
50 Broadway
New York, N. Y. 10004

PLAINTIFF BOARD OF EDUCATION'S COMPLAINT (Dated March 10, 1969)

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

THE BOARD OF EDUCATION, CENTRAL SCHOOL DISTRICT NO. 2, OF THE TOWNS OF BEDFORD, NEW CASTLE, NORTH CASTLE AND POUND RIDGE,

Plaintiff,

-against-

AETNA CASUALTY & SURETY CO.,

Defendant.

Plaintiff, by its attorney, Louis E.

Yavner, Esq., for its complaint, respectfully alleges
as follows:

1. That at all the times hereinafter mentioned, plaintiff was and still is a corporation organized and existing under and by virtue of the Education Law of the State of New York, having the management and control of the public schools of Central School District No. 2, Towns of Bedford, New Castle, Pound Ridge and North Castle, with the

right to make contracts and to sue and be sued.

- 2. Upon information and belief, at all the times hereinafter mentioned defendants AETNA CASUALTY & SURETY CO. (hereinafter referred to as "AETNA") was and still is a corporation duly organized and existing under the laws of the State of Connecticut, with its principal place of business at 111 Pearl Street, Hartford, Connecticut.
- 3. On or about February 21, 1968, plaintiff commenced an action against defendant herein in the Supreme Court of the State of New York, County of Westchester.
- 4. Subsequent thereto, and on or about March 21, 1968, defendant filed with the Clerk of the District Court herein a verified petition and bond praying for the removal, for all purposes, of the above-entitled action from the Supreme Court of the State of New York to the United States District Court for the Southern District of New York.
 - 5. The matter in controversy, exclusive

of interest and costs, exceeds \$10,000 and is between citizens of different states and the jurisdiction of this action thereby arises under Title 28, U.S.C., as amended, all as alleged in the aforesaid removal petition.

- 6. Heretofore and on or about March 17, 1964, plaintiff entered into a contract with one Fabrizio & Martin, Incorporated (hereinafter referred to as "Contractor"), wherein and whereby, in consideration of the sum of \$2,484,400.00, the Contractor agreed to furnish the materials and perform the general construction and site work for the Bedford Middle School, located in the Town of Bedford, County of Westchester, State of New York, according to the plans, specifications, addenda, and supplements provided for therein. Plaintiff incorporates said contract by reference herein and begs leave to refer to all the terms and conditions of said contract as the same may appear at the trial of this action.
 - 7. The said Contractor, as principal,

and the defendant AETNA herein, as surety, for a good and valuable consideration, duly made, executed and delivered to plaintiff a performance bond dated March 17, 1964, for the purposes of insuring the due performance of the said construction contract.

Annexed hereto and made a part hereof as Exhibit "A" is a copy of said bond.

- 8. Thereafter, the Contractor entered upon the performance of the said contract and in the course of said performance, certain disputes and differences arose between the Contractor and plaintiff which would warrant the termination of the said contract by plaintiff because of the breach thereof by the Contractor.
- 9. In an endeavor to resolve said disputes and differences, on or about March 23, 1965, a Supplemental Agreement was entered into by and between the plaintiff and the Contractor wherein, among other things, it was agreed that the Contractor would promptly resume performance of the work called

for under the aforesaid contract; that the dates of completion required as to various building units would be extended to certain fixed dates; and that the Contractor would pay a fixed sum for liquidated damages if it did not complete the contract within the new prescribed dates. Plaintiff incorporates said Supplemental Agreement by reference herein and begs leave to refer to all the terms and conditions of same as they may appear at the trial of this action.

10. Said Supplemental Agreement further provides as follows:

"This Supplemental Agreement shall not be effective unless it is duly agreed to, executed and acknowledged by the Surety."

and acknowledged the said Supplemental Agreement at the foot thereof, after the following words:

"SURETY COMPANY CONSENT

As required by the Contract, the Contractor has furnished a Performance Bond on which the Aetna Casualty and Surety Company is the Surety, which bond is dated March 17, 1964. The Surety consents to the foregoing Supplementary Agreement, and agrees that it is, by reference, made a part of said Bond and that the Surety's obligations under said Bond shall apply to the provisions of this Supplementary Agreement as well as to the provisions of the Contract. The Surety acknowledges that it has been kept informed of the disputes heretofore had between the Board and the Contractor and that it is bound by the settlement of said disputes contained in this Supplementary Agreement."

- 12. Thereupon, the Contractor resumed its work pursuant to the said Contract and Supplemental Agreement.
- 13. Thereafter and in or about March,
 1966, the Contractor refused to continue performance
 pursuant to the said Contract and Supplemental Agreement.
- 14. As a result thereof, plaintiff duly held the Contractor in default of said Contract and Supplemental Agreement and duly notified defendant AETNA of said default.
- 15. Plaintiff further duly demanded that defendant AETNA, in accordance with the terms of its

performance bond (annexed hereto as Exhibit "A"), promptly remedy the said default, or, promptly make arrangements to complete the job pursuant to the terms and conditions of the said Contract and Supplemental Agreement, and to otherwise comply with its performance bond.

- 16. Upon the failure of defendant AETNA to comply with the aforesaid demand, plaintiff duly entered into contracts with other contractors to perform the unfinished portions of work necessary to complete the Bedford Middle School. The said school was thereafter completed and accepted by plaintiff BOARD OF EDUCATION.
- 17. By reason of the foregoing, plaintiff incurred certain extra and additional costs and expenses, and sustained delay damages in connection with the completion of construction of the said Bedford Middle School, and is further entitled to liquidated damages pursuant to the aforesaid Supplemental Agreement, amounting in all to the sum of \$520,000.
 - 18. There is now justly due and owing to

the plaintiff from defendant surety company the said sum of \$520,000 for the damages sustained by plaintiff, as aforesaid, with appropriate interest thereon, no part of which has been paid although duly demanded.

WHEREFORE, judgment is demanded in the sum of \$520,000, together with appropriate interest thereon, and the costs and disbursements of this action, and for such other and further relief as to this Court may seem just and proper.

LOUIS E. YAVNER

LOUIS E. YAVNER

Attorney for Plaintiff
Office and P. O. Address
60 East 42nd Street

New York, New York 10017

Telephone: YUkon 6-2255

(Duly verified by Sheldon V. Burman, Attorney, Associated with Louis E. Yavner on March 10, 1969)

EXHIBIT A - PERFORMANCE BOND ANNEXED TO FOREGOING COMPLAINT



The Atna Casualty and Surety Company

Hartford 15, Connecticut

BOND NO.

PERFORMANCE BOND

KNOW	ALL	MEN	BY	THESE	PRESENT	S:
------	-----	-----	----	-------	---------	----

That FABRIZIO & MARTIN INCORPORATED of P. O. Box 67, 1082 R Post Road, Darien, Connecticus (Here Insert the name and address or legal title of the Contractor)
as Principal, hereinafter called Contractor, and THE ÆTNA CASUALTY AND SURETY COMPANY, as Sure
hereinafter called Surety, are held and firmly bound unto BOARD OF EDUCATION, CENTRAL SCHOOL DISTRICT
NO. 2, 130 Main Street, Mount Kisco, New York
(Here insert the name and address or legal title of the Owner) as Obligee, hereinafter called Owner, in the amount of
MILION FOUR HUNDRED EIGHTY-NINE THOUSAND FOUR HUNDRED AND NO 19914 2,489,400,00
for the payment whereof Contractor and Surety bind themselves, their heirs, executors, administrators, successors a signs, jointly and severally, firmly by these presents.
WHEREAS, Contractor has by written agreement dated March 17, 1964
Bedford, New York
in accordance with drawings and specifications prepared by The Architects Collaborative, Cambridge, Mass
(Here insert full name and title)

eference made a part hereof, and is hereinafter referred to as the Contract.

NOW, THEREFORE, THE CONDITION OF THIS OBLIGATION is such that, if Contractor shall promptly and faithfully perform said contract, then this obligation shall be null and void; otherwise it shall remain in full force and effect.

The Surety hereby waives notice of any alteration or extension of time made by the Owner.

Whenever Contractor shall be, and declared by Owner to be in default under the Contract, the Owner having performed Owner's obligation's thereunder, the Surety may promptly remedy the default, or shall

1) Complete the Contract in accordance with its terms and conditions, or

2) Obtain a bid or bids for submission to Owner for completing the Contract in accordance with its terms and conditions, and upon determination by Owner and Surety of the lovest responsible bidder, arrange

for a contract between such bidder and Owner, and make available as work progresses (even though there should be a default or a succession of defaults under the contract or contracts of completion arranged under this paragraph) sufficient funds to pay the cost of completion less the balance of the contract price; but not exceeding, including other costs and damages for which the Surety may be liable hereunder, the amount set forth in the first paragraph hereof. The term "balance of the contract price," as used in this paragraph, shall mean the total amount payable by Owner to Contractor under the Contract and any amendments thereto, less the amount properly paid by Owner to Contractor.

Any suit under this bond must be instituted before the expiration of two (2) years from the date on which final payment under the contract falls due.

No right of action shall accrue on this bond to or for the use of any person or corporation other than the Owner named herein or the heirs, executors, idministrators or successors of Owner.

of the lovest responsible bid	ider, arrange executors, idministrators or successors of Owner.
Signed and sealed this	day of
In the presence of:	FABRIZIO & MARTIN THEODROPATTO
James Falriges	BY: (Title) (Scal)
	THE ÆTNA CASUALTY AND SURETY COMI ANY
formance Bond for General Contractors. irical to April, 1959. irical to April, 1959. irical to April, 1959. irical to April, 1959. Irical to Architects. Irical to Architects. Irical to Council (Formerly Form 107) 1958 Edition. irical to Council (Formerly Form 107) 1958 Edition. irical to Council (Formerly Form 107) 1958 Edition. irical to Council (Formerly Formerly For	Resident Vice President and Residert Agent, State of New York (Thomas P. Moyna) (Seal) Attest: Resident Assistant Socretary (Julia Hildosho
	EXHIBIT A"

Power of Attorney and Certificate of Authority of Resident Vice Presidents and Resident Assistant Secretaries.

KNOW ALL MEN BY THESE PRESENTS, That The Fina Casualty and Surety Company, a corporation organized under the laws of the State of Connecticut and having its principal office in the City of Hartford, State of Connecticut, by its duly authorized officer, does hereby appoint lesident Vice President to sign and execute on its behalf, and to each Resident Assistant Secretary to seal and attest on its behalf, any and all bonds, gned by any one of said Resident Vice Presidents, when sealed and attested by any other person named below as one of said Resident Assistant Secretary to seal and attested as one of said Resident Assistant Secretary to seal and attested by any other person named below as one of said Resident Assistant Secretary to seal and attested and attested by any other person named below as one of said Resident Assistant Secretary to seal and attested and attested by any other person named below as one of said Resident Assistant Secretary to seal and attested and attested:

RESIDENT VICE PRESIDENTS
E. W. Ellison
H. F. O'Malley
James P. Quinn
Harry J. Warner
Joseph Eturaspe
Joseph F. Placenza
Morris Sandberg
Sidney Moritz, Jr.
D. Blush
Julia Kildosher
C. M. Piciullo
Albert Davis
Thomas P. Moyna

E. W. Ellison
H. F. O'Malley
James P. Quinn
Harry J. Warner
Joseph Eturaspe
Joseph F. Placenza
Morris Sandberg
Sidney Horitz, Jr.
D. Blush
Julia Kildosher
C. M. Piciullo
Albert Davis
Thomas P. Moyna

New York, New York

These appointments are made under and by authority of the following provisions of the by-laws of the Company which provisions are now in

MICLE IV—Section 9. The President, any Vice President, or any Secretary may from time to time appoint Resident Vice Presidents, Resident Assistant Secretaries, to sign with the Company's name and seal with the Company's seal bonds, recognizances, contracts of indennity, and other writings obligatory in the nature of a and authority given him.

Valid and binding upon the Company when (a) signed by the President or a Vice President or by a Resident Vice President, pursuant to the power prescribed in the Company's seal by a Secretary o: Assistant Secretary or by a Resident Secret

This Power of Attorney and Certificate of Authority is signed and sealed by facsimile under and by authority of the following resolution adopted by the Board Directors of The Ætna Casualty and Surety Company at a meeting duly called and held on the 15th day of July, 1960.

RESOLVED: That the signature of Guy E. Mann, Senior Vice President, or of A. H. Anderson, Vice President, or of J. R. Julien, Secretary, or of D. N. Gage, etary, and the seal of the Company may be affixed by facsimile to any power of attorney or to any certificate relating thereto appointing Resident Vice Presidents, Resident Secretaries or Attorneys in Fact for purposes only of executing and attesting bonds and undertakings and other writings obligatory in the nature thereof, any such power of attorney or certificate bearing such facsimile signature or facsimile seal shall be valid and binding upon the Company and any such power so hich it is attached.

IN WITNESS WHEREOF, The Æine Casualty and Surety Company has caused this instrument to be signed by its Secretary its corporate seal to be hereto affixed, this 19th day of February , A. D., 1964.

The Ætna Casualty and Surety Company,



By H fag

of

Connecticut, County o		, A. D., 1964, before me personally came D. N. GAGE
seer sure beet will wed to	y Company, the corneration des	peing by me duly sworn, did depose and say: that he is Secretary of secribed in and which executed the above instrument; that he knows the seal of said corporate seal; that is was so affixed by authority of his office under the hy-laws of said corporate.
		Notary Public. John My Commission Expires Mar. 31, 1066
		CERTIFICATE
REBY CERTIFY the	it the foregoing and attached P	he Æina Casualty and Sure y Company, a stock corporation of the State o Connecticut, Power of Attorney and Cerificate of Authority remains in full force and has not been of the By-Laws of the Company, and the Resolution of the Board of Directors, as set
gned and Sealed at the March A	Home Office of the Company, D., 19 64.	in the City of Hartford, State of Connecticut. Dated this 17th Secretary
mattument; that I	day of k MARTIN INCORPORATED the knows the seal of said corporate the Board of Directors of said and	to me known, who, being by me duly sworn, deposes and says:
		reporation, and that he signed his name thereto by time order.
	bornton in a comme	
		OWLEDGMENT—IF INDIVIDUAL OR FIRM
State of New .	fork, County of	as:
On this	day of acknowledged to me that he execu	, 19 , before me personally appeared , to me known to be (the individual) (one of the firm of) described in and who executed the within instrument, and uted the same (as the act and deed of said firm).

SURETY COMPANY'S ACKNOWLEDGMENT

	State of New Yor	rk, County of	Now York	. 881		
	On this	17th	day of March		, 1964 , before me personally appe	ared
•		Thomas	P. Moyna	to me kuown, who	being by me duly sworn, deposes and	
	That he resides	in New York,	New York		that he is a Paridona Man Davidan	
-	the Board of Director do not exceed its asset Insurance of the State Law of the State of N	s of said corporations as ascertained in the cof New York & colored York, and the	on, and that he signed lethe manner provided by crificate of solvency an Acts amendatory there	described in and which e instrument is such corporat his name thereto by like ord y law; that said corporation d of its sufficiency as surety tof and supplemental theret	executed the within instrument; that it was so affixed by ordeler; that the liabilities of said corpora has received from the Superintendent of guarantor, pursuant to the Insurto, and that such certificate has not less than the such certificate has not	t he er of ation
	sevoven! must us m wo	dustyted with	Julia	Kildosher	and basses Lie as 1	L .
	Resident Assistant' Seinstrument is in the graid Board of Director				sistant Secretary subscribed to the sthereto subscribed by like order of	

No. 41-2030030 - Queens County

Cert. filed in New York

Term Expires Merch 30, 1965

No. 41-2030030 - Queens County

No. 41-2030030 - Queens County

Cort. filed in New York—Crumy

No. 41-2030030 - Queens County

No. 41-2030030 - Queens County

Cort. filed in New York—Crumy

Notary Public

THE ETNA CASUALTY AND SURETY COMPANY, HARTFORD, CONNECTICUT
FINANCIAL STATEMENT AS OF DECEMBER 31, 1962
AS FILED WITH THE INSURANCE DEPT'T. OF THE STATE OF NEW YORK
CAPITAL STOCK \$24 500 000

		WETTYP OF	100 000 page 500 000				
ASSETS		LIABILITIES					
n hand and in banks States	\$ 40	0 005 630	Unearned premium reserve	\$201 389 567			
ernment obligations		964 918	Tax reserve	342 840 960 16 503 211			
of The Standard Fire	477	285 188	Retirement allowance fund Other liabilities	9 840 000 22 370 858			
wrance Company stocks	18	815 367	Reserve for reinsurance in	22 370 838			
state .		872 027	companies not authorized in New York	- 6 530 459			
m balances ment incomo due and	. 64	303 778	Total Labilities	\$599 475 055			
rued Assets		276 706					
	7	290 636	Capital \$ 24 500 00 Surplus 129 329 77	2			
		•	Contingency reserve 109 449 76. Surplus to policyholders	2			
Admitted Assets	\$862	754 589	Total	263 279 534 \$862 754 589			

ties carried at \$2 639 1:94 in above statement are on deposit with public authorities, as od by law.

DEFENDANT'S ANSWER

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

THE BOARD OF EDUCATION CENTRAL SCHOOL DISTRICT NO. 2, OF THE TOWNS OF BEDFORD, NEW CASTLE, NORTH CASTLE and POUND RIDGE,

Plaintiff,

-against-

AETNA CASUALTY AND SURETY CO.,

Defendant.

Defendant, by its attorneys, MAX E. GREEN-BERG, TRAYMAN, HARRIS, CANTOR, REISS & BLASKY, for its answer to the complaint, respectfully alleges as follows:

- l. Admits the allegations contained in Paragraphs "1", "2", "3", "4" and "5" of the Complaint.
- 2. With respect to the allegation contained in Paragraph "6" of the Complaint, admits that on or about March 17, 1964, plaintiff and Fabrizio

and Martin, Incorporated (hereinafter referred to as "Fabrizio") entered into an agreement for the furnishing of material and performing the general construction and site work for the Bedford Middle School and specifically denies that said contract was a valid contract and further alleges that said contract was judicially declared illegal and void.

tained in Paragraph "7" of the Complaint, admits that Fabrizio and Martin, Incorporated, as principal and defendant as surety made, executed and delivered to plaintiff a performance bond dated March 17, 1964 and defendant incorporates said bond and all documents referred to therein with the same force and effect as though fully set forth at length herein. For the exact terms and conditions of said bond defendant begs leave to refer to the same at the trial of this action. Except as admitted, defendant denies each and every other allegation contained in Paragraph "7" of the Complaint and specifically

denies that there was good and valuable consideration for said performance bond and specifically denies that said bond is valid.

- 4. Upon information and belief denies each and every allegation contained in Paragraph "8" of the Complaint.
- 5. With respect to the allegations contained in Paragraph "9", "10" and "11" admits, upon information and belief that on or about March 23, 1965, a Supplemental Agreement was entered into by and between plaintiff and FABRIZIO, that defendant executed said agreement and defendant begs leave to refer to the terms and conditions contained therein as though fully set forth at length herein. Defendant specifically denies that said Supplemental Agreement was valid and further alleges that same was declared judicially illegal and void. Except as heretofore specifically admitted, defendant denies each and every other allegation contained in Paragraphs "9", "10" and "11" of the complaint.

- 6. With respect to the allegations contained in Paragraphs "12", "13" and "14", admits upon information and belief that FABRIZIO continued in the performance of its illegal contract with plaintiff until on or about March, 1966 when upon information and belief Fabrizio ceased performance and plaintiff notified defendant of its contention that Fabrizio was in default. In all other respects said allegations are denied.
- 7. Denies each and every allegation contained in Paragraphs "15", "16", "17" and "18" of the Complaint.

AS AND FOR A FIRST COMPLETE AFFIRMATIVE DEFENSE TO THE COMPLAINT, AETNA CASUALTY AND SURETY COMPANY ALLEGES:

8. That this action arose out of a bond in the sum of \$2,489,400.00 executed by defendant as surety and FABRIZIO & MARTIN INCORPORATED ("Fabrizio"), as principal and delivered to plaintiff Board of Education, as obligee, conditioned for the performance by FABRIZIO of a contract with the plaintiff for the general construction and site work for

the Middle School, Bedford, New York.

9. That prior to the commencement of this action, FABRIZIO instituted an action in the United States District Court, Southern District of New York, 66 Civ. 2935 against the plaintiff herein for damages arising out of the breach of contract alleged in Paragraph "6" of this Complaint bearing the following caption:

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

FABRIZIO & MARTIN, INCORPORATED,

Plaintiff,

-against-

66 Civ. 2935

THE BOARD OF EDUCATION CENTRAL SCHOOL DISTRICT NO. 2 of the TOWNS OF BEDFORD, NEW CASTLE, NORTH CASTLE and POUND RIDGE, MARS ASSOCIATES, INC. and NORMEL CONSTRUCTION CORP. OF NEW ROCHELLE, a joint venture,

Defendants.

10. That thereafter plaintiff Board of Education moved to stay the action pending arbitration pursuant to the terms of the contract.

- larly heard before Judge Edward C. McLean, U.S.D.C.J. who thereafter set the matter down for a hearing on the question of the validity of the underlying contract alleged in Paragraph "6" of the Complaint. That the issue thereon was duly tried on June 26th and June 27, 1967.
- 12. That Judge McLean, in his decision dated July 6, 1967, upon the evidence adduced at the hearing, found the facts to be as follows:
 - (a) In November, 1963, the Board of Education published a notice inviting bids for the construction of the school. Bidding documents, including plans and specifications of the School, were made available to bidders.

 Bids were to be submitted by December 19, 1963, but this date was extended to January 7, 1964.
 - (b) There were six bidders for the contract for general construction and site work.
 Of these, the three lowest were the following:

Contractor

Base Bid

Rand Construction Co. \$2,276,800.00

Fabrizio & Martin, Inc. 2,326,900.00

Walter A. Stanley Construction Co. 2,549,000.00

- (c) On January 22, 1964, the Board of Education awarded the general construction and site work contract to Rand Construction Co., the low bidder.
- (d) On February 5, 1964, Rand Construction Co. notified the Board that it withdrew its bid because it had discovered that it had made a mathematical error and the Board consented to this withdrawal.
- The next lowest bidder was Fabrizio & Martin, Incorporated who had notified the Board in January 9, 1964 that it had made an error and that its base bid should have been \$2,498,000.00 instead of \$2,326,900.00 a difference of \$171,000.00 and further asked permission to correct the error or withdraw its bid.

- (f) The Board negotiated with Fabrizio for the elimination of \$171,000.00 worth or work from the contract.
- (g) On February 20, 1964, the Board awarded the contract for general construction and site work to Fabrizio at its bid figures.
- (h) On March 17, 1964, Fabrizio and the Board signed a formal construction contract for the general construction and site work and simultaneously therewith signed another document entitled "Change Order", incorporating the previously agreed upon eliminated items of work, resulting in a savings to Fabrizio of \$171,000.00, the amount of Fabrizio's error in its bid.
- (i) The original plans and specifications dated November 7, 1963, upon the basis of which the contractors filed their original bids, were approved by the State Education Department. The new drawings attached to the change order of

March 17, 1964, which changed these plans in certain respects were not submitted to the State Education Department for approval before June, 1967.

- (j) The Board did not request other contractors to bid upon the work as modified by the change order of March 17, 1964, nor were other contractors ever advised that the plans and specifications had been changed in these respects."
- 13. That Judge McLean in his decision dated July 6, 1967 held that the contract awarded to Fabrizio was not awarded in compliance with Section 103(1) of the General Municipal Law and under controlling decisions, was illegal and void.
- 14. That said decisions holding the contract illegal and void was rendered on the merits and was a final determination herein upon the same contract and upon all the issues upon which the complaint herein is founded.

- 15. That by reason of the premises it is res judicata that the contract which forms the basis of plaintiff's claim is illegal and void.
- 16. That by reason of the premises the bond is void and of no effect.

AS AND FOR A SECOND COMPLETE AFFIRMATIVE DEFENSE TO THE COMPLAINT, DEFENDANT AETNA CASUALTY AND SURETY COMPANY ALLEGES:

- 17. Defendant repeats, reiterates and realleges each and every allegation contained in paragraphs marked "8", "9", "10", "11", "12", "13", "14", "15, "16" hereof with the same force and effect as though fully set forth at length herein.
- Ryan, U.S.D.C.J. in deciding a subsequent motion in the same action, brought by plaintiff Board of Education, granted summary judgment dismissing Fabrizio's complaint, confirming Judge McLean's holding declaring the contract illegal and void and stated as follows in Fabrizio & Martin, Incorporated v. The Board of Education Central School District No. 2, 290 F.

Supp. 945, at page 952:

"We agree with Judge McLean that New York Law and the undisputed facts dictated the holding that the contract was null and void."

- 19. That Judge Ryan further held in his decision that the supplemental agreement depended for its existence on the continued validity of the prime contract and that by reason of the prime contract being illegal and void, the supplemental agreement falls.
- 20. That said decision and judgment dismissing the complaint and holding the contract and supplemental agreement illegal and void was rendered on the merits and was a final determination herein upon the same contract and upon all the issues upon which the complaint herein is founded.
- 21. That by reason of the premises, it is res judicata that the supplemental agreement which forms the basis of plaintiff's claim is illegal and void.
 - 22. That by reason of the premises the

bond as modified is void and of no effect.

AS AND FOR A THIRD COMPLETE AFFIRMATIVE DEFENSE TO THE COMPLAINT DEFENDANT AETNA CASUALTY AND SURETY COMPANY ALLEGES:

- 23. Defendant repeats, releterates and realleges each and every allegation contained in paragraphs marked "8", "9", "10", "11", "12", "13", "14", "15", "16", "18", "19", "20", "21", "22", hereof with the same force and effect as though fully set forth at length herein.
- 24. That by reason thereof the bond alleged in paragraph "7" of the complaint is void for want of consideration.

AS AND FOR A FOURTH COMPLETE AFFIRMATIVE DEFENSE TO THE COMPLAINT DEPARTMENT AETNA CASUALTY AND SURETY COMPANY ALLEGES:

25. Defendant repeats, reiterates and realleges each and every allegation contained in paragraphs marked "9", "10", "11", "12", "13", "14", "15", "16", "18", "19", "20", "21", "22" hereof with the same force and effect as though fully set forth at length herein.

- 26. That defendant when it executed and delivered the bond was not aware of the facts rendering the contract illegal and void.
- 27. That the bond as alleged in Paragraph "7" of the complaint was executed by the defendant and given to the plaintiff without knowledge that the contract between plaintiff and Fabrizio was illegal and void and without knowledge of the course of events preceding the award of the contract by plaintiff to Fabrizio.
- 28. That neither the principal nor plaintiff advised defendant of such facts.
- 29. That defendant did not intend to and would not guarantee performance of an illegal contract.
- 30. That defendant was induced thereby to furnish its bond under fraudulent conditions and would not have done so had it known the facts rendering the contract illegal and void.
 - 31. That by reason of the premises the

bond is void and of no effect and plaintiff is estopped from maintaining this action upon the bond furnished pursuant to the illegal and void contract.

WHEREFORE, defendant demands judgment dismissing the complaint, together with costs and disbursements of this action, and for such other and further relief as to this Court may seem just and proper.

MAX E. GREENBERG, TRAYMAN, HARRIS, CANTOR, REISS & BLASKY
Attorneys for Defendant
Office & P. O. Address
30 Vesey Street
New York, New York 10007
Tel. No. 267-5700

By: s/ Max E. Greenberg
Member of the Firm

OPINION OF McLEAN, J. (Dated May 5, 1967)

Fabrizio & Martin, Inc. v. Board of Education, 65 Civ. 2935 Civ.Mot.Cal. Feb. 21, 1967 Motions Nos. 9 and 86

The nature of this action is briefly described in my opinion filed herewith denying a motion by two tempsyers (Motion No. 56) for leave to intervene.

By Motion No. 9 plaintiff seeks leave to amend its complaint to add a count for a declaratory judgment determining the validity of the construction contract.

By Motion No. 86, defendant Board of Education seeks an order staying this action on the ground that plaintiff's claims are arbitrable under a "valid written agreement" between the parties.

Plaintiff's motion gives rise to a difficulty in that neither in its motion papers nor in its proposed smended pleading, does plaintiff take a position as to whether or not the contract is valid. Plaintiff appears to be asking advice from the court on that subject. A request for a declaratory judgment in this form does not present a justiciable controversy.

Poiled Co., 30 F.Supp. 777
(D. Del. 1939)

Moreover, there is no need for the procedure which plaintiff suggests in order to obtain a determination of the issue of contract validity. That question is presented by defendant's motion.

In seeking a stay of this action "pursuant to Section 7503 of the New York Civil Practice Law and Rules," plaintiff ignores the fact that Section 7503, unlike the prior Civil Practice Act, does not expressly provide for such a motion. The section does, however, authorize a motion to compel arbitration. If the motion is granted, the stay is automatic. I will treat defendant's motion as one seeking that relief.

Section 7503 provides that "where there is no substantial question whether a valid agreement was made," the court shall direct the parties to arbitrate, but that "where any such question is raised, it shall be tried forthwith in said court." This language leaves no room for doubt that the question of the validity of the contract to arbitrate is to be decided by the court, not by the arbitrators.

Durat v. Arash, 22 App. Div. 2d 39, 253 II.Y.S.2d 351 (let Dept. 1964), eff'd on eminion below, 17 N.Y.2d 445 (1955) Here the agreement to arbitrate is part of the construction contract. Determining the validity of one inevitably involves a determination of the validity of the other. Thus, in passing upon defendant's motion, the question which plaintiff wishes to raise by swendment of its complaint will be decided and no smendment will be necessary.

Wholly spart from the question of validity of the contract, there may be a question as to the scope of the arbitration clause, i.e., whether it is broad enough to constitute an agreement to arbitrate claims of the type asserted by plaintiff here. This question can be determined at the same time.

Defendant's motion is set down for a hearing on both questions at 10:00 A.M. on Friday, May 19, 1967.

Plaintiff's motion for leave to smend its complaint is denied.

So ordered.

Dated: May 5, 1967

Emmas Chilean



OPINION OF McLEAN, (Dated May 5, 1967)

PARIZIO & MARTIN, INCORPORATED,

Plaintiff,

-against-

THE COARD OF EDUCATION, CENTRAL SCHOOL DISTRICT NO. 2 CF THE TOTALS OF EMPIOND, HEN CASTLE, MENTH CASTLE and POUND RIDGE, MODO ACCCCLATES, LIG. and NORMEL CONSTRUCTION CORP. OF MEN ROCHELLE, a joint venture,

Defendents.

MCLEAN, D. J.

This is an action by a building contractor upon a construction contract for a school. Defendants have not as yet enswered, hence the issues have not been defined. Jurisdiction is based upon diversity of citizenship.

3 Two texpayers of the school district, purporting to act on their own behalf and on behalf of all other texpeyers, move for leave to intervene and to file an answer alleging that the contract is invalid because it was not awarded as a result of competitive bidding as required by Section 103 of the General Municipal Law of

65 Civ. 2935

Motion No. 56 on Feb. 21, 1967

OPINION

New York. They allege that the interests of the texpeyers will not be adequately represented if they are not granted leave to intervene, because defendant Eoerd of Education will be unwilling to plead the invalidity of the contract, since to do so would require it to admit that in swarding the contract it acted contrary to low. Two former members of the Board of Education who were in office when the contract was swarded, support the motion to the extent of saying that they believe that the court should investigate the facts and determine the question of legality.

The Board of Education opposes the motion. It claims that it complied with all legal requirements and that the contract is valid.

The motion is based on Rule 24. The applicants claim an absolute right to intervene under Rule 24(a)(2), which provides for intervention:

an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties."

which applies:

defense and the main cosion have a question of low or feet in common."

As to the first contention, the more fact that the applicants are tempoyers of the school district and that their temes may be effected in some small amount by the outcome of this litigation does not give them a sufficient interest to entitle them to intervens.

Although no cases in point construing Rule 24(c)(2) in its present form have been found, the older cases under the rule in its previous form and under its predecessor, Equity Rule 37, hold that tempoyers do not have such an interest.

See, e.g., Linding v. Uniced Graces, 320 F.2d COS (Den Cir. 1964)

3

Mac'ry v. Giry of Lintle Book, 94 V.2d 540 (Joh Gir. 1983), cort. denied, 304 U.S. 582

Co. v. Conv. of Array, 40 F.2d 795 (6th Cir. 1951), comp. Conied, 204 U.S. 633 (1951)

ONLY COPY AVAILABLE

... .-.

0'Compati v. Tand Va Con A 10 200 1 19 0 20 400 (900 01= 1927)

The same principle would appear to be applicable under the rule as it now stands.

Although the recent decision of the Suprema Court in Cascade Natural Cas Comp. v. El Pago Natural Gas Co., 35 U.S.L. Week 4227 (U.S. Feb. 27, 1957) appears to have relaxed to some extent the rules governing intervention, that case did not involve on application by a taxpayer. It is not authority for the applicants' position here.

The right to intervene in this setion is, of course, a matter of federal law.

Nevertheless, it may be noted that under New York lew intervention would be denied.

171 Mice. 125, 11 N.Y.S.2d 933 (Sup. Ct. 1939)

Cove, 22 Mise. 21 279, 197 U.Y.S.2d 940 (Sup. Ct. 1900) As to discretionary intervention under

Rule 24(b)(2), intervention is permissible only when

the applicants have a "claim or defence." If they have

no interest, they have no claim or defence.

250 F.Supp. 722 (0.3....... 1900)

Intervention was granted as a matter of discretion in a school segregation case, Stell v.

Savannah-Chathan Games Paard of Education, 333 F.2d 55 (5th Cir. 1964). In other school segregation cases intervention has been denied.

St. Falena Parish Sebest Tanai v. "all, 287 F.2d 376 (Seb Cla. 1901), and. denied, 360 U.S. 080 (1901)

Blecker v. Feard of Timation, 229 F. Supp. 714 (E.D.H.Y. 1984)

The <u>Stell</u> case does not seem to me sufficiently analogous to the present situation to justify allowing intervention here.

The question of the legality of this construction contract should be determined. That question is raised by

• motion made by defendant Board of Dissistion (No. 86) to stay this section on the pround that plaintiff's claims against the Board of Education should be submitted to erbitration pursuant to an orbitration clause in the contract. Defero that metion can be finally determined, the court must decide whether the contract is valid.

Accordingly, by separate memorandum filed herewith with respect to Motion No. 85, I have set that issue down for a hearing.

The situation in this case is peculiar in that neither plaintiff nor defendant Deard of Education wishes to take the position that this contrast is invalid.

Nevertheless, the court must decide whether or not it is.

Under these circumstances, the views of the would-be intervenors may prove to be of assistance to the court.

Although I am constrained to deny the motion to intervene for the reasons previously stated, I will permit these applicants to serve as amici curies at the forthcoming hearing on Motion No. 36, if they so desire. They may attend the hearing, participate in it, and file a brief. Their participation will be limited to the sole question of the legality of the contract.

Motion denied. So ordered.

Dated: 12y 5, 1967 Edmind Chican
U. S. D. J.

OPINION OF McLEAN, J. (Dated July 6, 1967)

McLean, D. J.

In this action by a building contractor for alleged breach of a contract for construction of a school, defendant Board of Education moved to stay the action pending arbitration. All parties agree that this motion is to be treated as one under New York CPLR § 7503 to compel arbitration. In a memorandum dated May 5, 1967, I set the motion down for a hearing on the question of the validity of the contract. The hearing was held on June 26 and 27, 1967.

Before considering the evidence developed at the hearing, I note briefly my views on a question which has not been raised by any of the parties, i.e., whether the issue of alleged illegality of the contract to arbitrate is to be determined by the court or by the arbitrators. The contract to arbitrate is part of the construction contract. It is claimed that the entire contract is illegal because it was not awarded pursuant to competitive bidding as required by New York General Municipal Law § 103.

Jurisdiction of this action is based upon diversity of citizenship. All parties have assumed that it is governed by New York law, that the present question is to be determined under New York law, and that under that law the question is one for the court, not the arbitrators. This last assumption is correct as a matter of New York law.

N. Y. CPLR § 7503
Durst v. Abrash, 22 App. Div. 2d 39, 253 N. Y. S.
2d 351 (1st Dept. 1964), aff'd on opinion below,
17 N. Y. 2d 445 (1965)

10

Since my memorandum of May 5, 1967 was filed, the Supreme Court has decided Prime Paint Corporation v. Flood & Conklin Mfg. Co., 35 U. S. L. Week 4575 (U. S. June 12, 1967). The Court there held that the question of whether a contract containing an arbitration clause was invalid because the contract was induced by fraud was to be determined by the arbitrators, not by the court. It held that the question was governed by the Federal Arbitration Act (9 U.S.C. § 3) despite the fact that jurisdiction of the action rested on diversity of citizenship and the motion had been based upon the New York statute. The court held that this was so because the basic contract, a consulting agreement incidental to the purchase of a business, was a "contract evidencing a transaction involving commerce" within the meaning of 9 U.S.C. §2.

In my opinion this decision does not apply to the present case, even if it be assumed that this school construction contract is also one "evidencing a transaction involving" interstate commerce. On the merits of the question, i.e., whether the arbitrators, rather than the court, are to decide the issue of fraud, *Prime Paint* approved the rule heretofore followed in this Circuit under the Federal Arbitration Act in cases involving fraud in the inducement.

Robert Lawrence Co. v. Devonshire Fabrics, Inc., 271 F. 2d 402 (2d Cir. 1959), cert. dismissed, 364 U. S. 801 (1960)

Here the question is not one of fraud, but of illegality. In In re Kinoshita & Co., 287 F. 2d 951 (2d Cir. 1961), the Court of Appeals held that the Lawrence rule does not apply where (1) the question is not one of fraud but rather whether "any contractual relation whatever" existed between the parties, or (2) where the arbitration

clause is not broad enough to encompass the dispute. Kinoshita is presumably still good law. The Supreme Court cited it in Prime Paint (35 U. S. L. Week at 4577 n.8). The Kinoshita rule governs here, on both grounds. The question here is whether, in view of the alleged illegality, any contractual relationship whatever existed. The arbitration clause in this contract is clearly not broad enough to encompass this question.

See American President Lines, Ltd. v. S. Woolman, Inc., 239 F. Supp. 833 (S. D. N. Y. 1964)

Accordingly, I hold that, even if the federal rather than the New York act applies, the question is one to be determined by the court upon this motion.

Upon the evidence adduced at the hearing, I find the facts to be as follows:

In November 1963, the Board of Education published a notice inviting bids for the construction of the school. Bidding documents, including plans and specifications of the school, were made available to bidders. Bids were to be submitted by December 19, 1963, but this date was extended to January 7, 1964.

There were six bidders for the contract for general construction and site work. Of these, the three lowest were the following:

Contractor	Base Bid
Rand Construction Co.	\$2,276,800
Fabrizio & Martin, Inc.	2,326,900
Walter A. Stanley Construction Co.	2.549.000

In addition to the base bid, bids were also invited and received for certain additional work, described as "alternates." The only alternate of relevance here, Alternate No. 3, involved the construction of a running track and other athletic facilities.

On January 22, 1964, the Board, by a vote of threat two, adonted a resolution calling a meeting of the votes of the school district for February 20, 1964 to take action on the bids and upon the issuance of bonds to finance the project. The amount of the proposed bond issue for construction of the school was \$4,050,000. In addition, a separate bond issue in the amount of \$95,000 was proposed for construction of the athletic facilities covered by Alternate No. 3. The Board at this meeting also adopted a resolution which "awarded" the general construction and site work to Rand Construction Co., the low bidder, subject to the action of the voters at their forthcoming meeting on February 20, 1964.

On February 5, 1964, Rand Construction Co. notified the Board that it withdrew its bid because it had discovered that it had made a mathematical error. After some consideration, the Board consented to this withdrawal. This left Fabrizio as the low bidder on the general construction and site work contract. But Fabrizio also claimed that he had made an error. In fact he discovered his mistake before Rand made a similar discovery, for it was on January 9, 1964 that Fabrizio wrote to the Board stating that his base bid should have been \$2,498,

[•] Despite the fact the main bond issue was recommended in the amount of \$4,050,000, the Board, apparently fearing criticism on the ground of extravagance, announced that actually it would not spend more than \$3,800,000, and that it would not issue bonds for more than that amount.

000 instead of \$2,326,900, a difference of \$171,100. He asked permission to correct the error or to withdraw his bid.

Four members of the Board held a meeting with Fabrizio on February 10, 1964. The Board's attorney and a representative of the architect were present. A tape recording was made of this meeting with the knowledge of those present. The recording and a typed transcript of it were received in evidence. Several of the persons who were present testified at length as to what transpired.

It is clear beyond question, and I so find, that at this meeting Fabrizio satisfied the Board that he had in fact made a mathematical error of approximately \$171,000 in computing his bid and that thereafter the participants in the meeting attempted to find a way by which \$171,000 worth of work could be eliminated from the specifications so that Fabrizio could afford to accept the contract at his original bid price of \$2,326,900 and still not lose any of the \$171,000. Various suggestions were made, but no agreement was reached, and at the end of a long meeting it was left that Fabrizio would discuss the matter further with the architects.

It is also a fair inference that some of the Board members present had misgivings as to whether such a reduction of the contractor's obligation might not run afoul of statutory competitive bidding requirements. Early in the meeting, the chairman of the Board stated, according to the transcript:

"See, we wind ourselves up with the problem that under State law, if we would then take your change of figure here it would then violate the basis upon which we then could grant the contract, because this would mean a change in the overall figures.

Now in order for us to be able to do this thing, it simply means that there would have to be a waiver of the 171,000 and then there would have to be some way that we could find making this thing up somewhere along the line. Have you got any bright ideas?"

The architect said:

"But you are going to have to cut something, you can't save \$170,000 by sharpening a pencil. It has to be several major things and a lot of minor things to make it up."

Subsequently, another member remarked:

"I mean, to be utterly blunt about it without saying anything I don't think this is something that would bear repeating—if we have to throw our hands up in the air and re-bid it, it's going to be a whole new party. It is a whole new party for you, if you want this job, as it is for everybody else. You are in a spot where you can see the end of the tunnel because you are the nearest to it. And I think in your mind's eye you have got to go back and look at these contingencies from the point of view of what can you do to get it with the here and now without trying to get into the wrestling match with the public again."

Finally, a Board member inquired of the Board's attorney:

"Is this reasonable to do, counsel without prejudice? We don't expose ourselves to slings and arrows from the other bidders?"

To this counsel replied:

"No. No exposure."

The architect thereupon inquired:

"What would you propose to do then? Enter into the contract without any of this on paper?"

To this query, one Board member said, "Oh, no," while another Board member said, "You have got to."

Counsel thereupon stated:

"Well, we've got to see what it is. If you see there are changes throughout the job, you can sign the contract and immediately sign change orders."

With respect to this advice, one Board member commented that it was "like passing checks around."

Fabrizio said:

"I would be willing to cooperate as much as you people would like me to."

On February 20, 1964 the voters authorized the construction of the school and athletic facilities and approved the bond issues in the full amounts of \$4,050,000 and \$95,000 respectively. On the same day the Board unanimously adopted a resolution which "awarded" the contract for general construction and site work to Fabrizio "at the bid figures."

Meanwhile, Fabrizio conferred with the architect in an effort to find ways and means of eliminating \$171,000 worth of work from the contract. On February 12, the Clerk of the Board made a memorandum of a telephone conversation between the chairman and the architect "in which it was determined that through certain changes in

the contractors procedures as well as removal of certain items from the base plans the Fabrizio and Martin bid could come within the \$3,800,000 budget figure."

On February 13, the architect wrote to the chairman suggesting specific ways in which the saving could be accomplished.

On February 18, Fabrizio wrote to the Board stating that if Fabrizio & Martin, Inc. were awarded the general construction and site work contract "at our bid figures," it intended to withdraw its letter of January 9, 1964 in which it had requested permission to withdraw its bid.

On March 10, 1964, the architect wrote to the Board's attorney specifying the items that could be eliminated or changed and setting forth the dollar amount by which each deletion or change would reduce Fabrizio's cost. After allowing for a slight increase in the cost of one item, the net saving to Fabrizio came to \$1,677 more than the \$171,000 error.

On March 17, 1964, Fabrizio and the Board signed a formal construction contract in which Fabrizio undertook to perform all the work "shown on the Drawings and described in the Specifications entitled Middle School, Bedford, New York (Drawings & Specifications dated November 7, 1963)" for \$2,326,900 for the basic work and \$99,000 for Alternate No. 3. The "Drawings & Specifications dated November 7, 1963" were the original drawings and specifications upon which all the contractors had originally been asked to bid. The prices for the basic work and for Alternate No. 3 set forth in this contract were the exact sums specified by Fabrizio & Martin, Inc. in its original bid submitted on January 7, 1964.

Simultaneously with the signing of this contract, Fabrizio and the Board signed another document entitled "Change Order." At the hearing, the Board's attorney testified that this document was prepared by the architect. The architect testified that it was prepared by the attorney, on the basis, however, of data furnished by the architect. Whoever prepared it, certain features of it are of interest.

The document began by stating that "The modifications listed herein change our agreement executed this 17th day of March, 1964," i.e., the formal construction contract which the parties had signed a moment or two before. It then listed certain items to be deleted, i.e., rip-rap, an elevator, three dumb waiters and some snow fencing. It deleted brick paving, although it provided for a "better finish" on the concrete slabs on which the paving was to have been placed. It provided for the omission of the lower play field and the archery area as shown on the original plans, and for the substitution of two other play fields which were to be used as a source of fill for the construction work, a so-called "borrow area." These were to be left "rough-graded," without top soil or seeding, all as shown by new plans annexed to this document.

Finally, the change order provided for a change in the location of the athletic track (Alternate No. 3) in accordance with a new drawing annexed to the change order. The document concluded with this obscure sentence:

"Contractor shall include in this Alternate No. 3 a cash allowance of \$1,677 in the agreed upon price."

No dollar figures were set against any of these items. The evidence shows, however, beyond question, and I so find, that the items contained in this change order were substantially those which the architect had recommended

for change or elimination in his letter to the attorney of March 10, 1964. The net result of these changes and omissions was to reduce Fabrizio's cost by \$172,677. This was precisely \$1,677 more than the \$171,000 which the Board had agreed to save him. Thus, the sentence quoted above means that Fabrizio would repay this expect the Board by giving the Board "a cash alloward" of \$1,677.

The original plans and specifications dated November 7, 1963, upon the basis of which the contractors filed their original bids, were approved by the State Education Department. The new drawings attached to the change or ler of March 17, which changed these plans in certain respects, were not submitted to the State Education Department for approval before June 1967. The testimeny does not clearly establish that they were submitted even then.

The Board did not request other contractors to bid upon the work as modified by the change order of March 17, 1964, nor, as far as appears, were other contractors ever advised that the plans and specifications had been changed in these respects.

On February 24, 1964, several weeks before the execution of these documents, the Superintendent of Schools wrote to the chairman of the Board pointing out that "any deviation from the original contract by way of change orders must have the approval of the State Education Department." The change order signed on March 17, 1964 was not submitted to the State Education Department or approved by it until June 1967, over three years later

[•] The former elerk of the Board testified that on March 17, 1964 the assistant superintendent of schools instructed him to see to it that copies of this letter of March 10, 1964 were removed from the files of the school district.

and long after this litigation had been begun and the legality of these proceedings had been challenged. By letter dated June 23, 1967, just three days before the beginning of the hearing on this motion, the State Education Department approved the change order, stating that "it does not violate any of our past or present standards." The evidence does not disclose what the Board told the State Education Department in late June 1967 concerning the circumstances under which this change order was executed.

Change orders were signed by three other contractors on this job on March 17, 1964. In each case the dollar amount of the change was specifically stated. The amounts were \$26,000, \$1,300 and \$925 respectively. These amounts were deducted from the contract price. Each of these change orders was approved by the State Education Department on October 26, 1964.

On March 25, 1964, the Board unanimously adopted a resolution which ratified the execution of the "contracts and change orders," without comment.

Various other change orders were issued to all the contractors from time to time as their respective work progressed. Each of these change orders was approved by the State Education Department. The time lag between the performance of the work covered by the change order and the approval of the change order did not exceed twelve months in any case.

With respect to the athletic track (Alternate No. 3), the evidence establishes the following facts. On February 20, 1964, the voters of the District authorized the expenditure of \$95,000 on these facilities. The formal contract signed by the Board and Fabrizio on March 17, 1964 set forth a price for them of \$99,000. The change order signed simultaneously therewith modified Alternate No. 3 in accord-

ance with a new drawing. Although the change order was silent as to the effect of this change in dollars, actually the change increased Fabrizio's cost for this particular work, although by virtue of the change, the Board was able to save money on blasting, which it would otherwise have been required to do. This saving was of no concern to Fabrizio, since the blasting was not to have been done at his expense in any case.

On March 19, 1964, the Board's attorney advised the Superintendent of Schools that although Fabrizio's contract provided for \$99,000 for Alternate No. 3, "Mr. Fabrizio has agreed orally with Mr. Van Allsburg [chairman of the Board] that the certificates covering this work will not exceed \$95,000 but that this will not affect the total contract price."

Fabrizio submitted requests to the Board for part payment from time to time as the work progressed. These requests consistently showed \$99,000 as the contract price of Alternate No. 3 until February 1966. The Board's attorney then told Fabrizio that he must take \$4,000 off the \$99,000 and put it in another item. Fabrizio had already been paid \$98,000 for his work on Alternate No. 3 by that time.

Section 103(1) of the New York General Municipal Law provides, in pertinent part, as follows:

"... all contracts for public work involving an expenditure of more than twenty-five hundred dollars... shall be awarded by the appropriate officer, board or agency of a political subdivision... to the lowest responsible bidder furnishing the required security after advertisement for sealed bids in the manner provided by this section."

The definition of a "political subdivision" in Section 100(1) of the General Municipal Law includes a school district.

A contract made by a board of education in violation of the competitive bidding requirement of this section is void.

Gerzof v. Sweeney, 16 N.Y. 2d 206 (1965)
Application of Gottfried Baking Co., 45 Misc. 2d
708, 257 N.Y.S. 2d 833 (Sup. Ct. 1964)
McDonough v. Board of Education, 20 Misc. 2d
98, 189 N.Y.S. 2d 401 (Sup. Ct. 1959)

This principle was established many years ago with respect to similar statutes requiring competitive bidding on municipal contracts.

Dickinson v. City of Poughkeepsie, 75 N.Y. 65 (1878)

People ex rel. Coughlin v. Gleason, 121 N.Y. 631 (1890)

The intent of the municipal officials is immaterial. If the statute was not complied with, it makes no difference that the officials did not intend to violate the law.

Dickinson v. City of Poughkeepsie, supra

It is thus unnecessary to decide in the present case how much weight to give to certain of the facts heretofore related which lend a somewhat furtive air to the Board's dealings.

It is likewise immaterial that the changes made in the plans and specifications presumably did not affect the value of this school to the citizens of the district as an educational institution. Nor does it make any difference, in my opinion, that one of the changes effected by the change of March 17, 1964, i.e., the change in the location of the track, may have saved money for the Board in the long run by eliminating blasting. Similarly, it is without significance that another change, the substitution of playing fields, may have provided a facility which was to some degree equivalent in utility to that called for by the original plans and omitted by the change order. The benefit, or lack of it, to the Board is not the test. A municipal corporation, bound by the statutory competitive bidding requirement, is not free as a private individual is to change its mind and to negotiate a new deal whenever it sees fit.

"In other words, the spirit of the statute requires that the plan of the work to be done be adopted before proposals are invited to the end that all bids may be for the same thing, and that nothing may remain to be determined by the board but the question as to which figures are the lowest. The statute implies a common standard by which bidders are to be measured. It implies plans previously adopted, which are to be open to all. It implies a chance to bid for a contract which is to be adopted; not that a contract may be adopted, after bids are in, and in view of them."

Grace v. Forbes, 64 Misc. 130, 138, 118 N. Y. Supp. 1062, 1967 (Sup. Ct. 1909)

Here the Board in effect permitted Fabrizio to change his bid after all the bids were in. Instead of allowing him to increase the dollar amount of the bid, it accomplished the same result by permitting him to omit some of the work called for by the original plans and specifications. The saving of \$171,000 to Fabrizio was not insubstantial. It amounted to over 7 per cent of his base bid.

The work that Fabrizio was called upon to perform was different from that which all the other contractors were asked to bid on. No one can say with certainty that if these modified plans had been made available to all would-be bidders, one of them would have bid a lower figure than Fabrizio's \$2,326,900. On the other hand, no one can say with certainty that this would not have occurred. The intent of the statute is that all bidders are entitled to an equal opportunity.

See

Application of Gottfried Baking Co., supra Application of Glen Truck Sales & Service, Inc., 31 Misc. 2d 1027, 220 N. Y. S. 2d 939 (Sup. Ct. 1961) Margrove, Inc. v. Office of General Services, 278 N. Y. S. 2d 485 (App. Div. 3rd Dept. 1967) 18 Ops. State Compt. 449 (1962)

In the Matter of the Appeal of Dague, 1 Ed. Dept. Rep. 103 (1958)

They were not afforded such an opportunity here.

Once a contract has been awarded in fair and open competition, it can doubtless be changed in minor respects from time to time in the course of the work. Such legitimate change orders are well known in all construction work. But that is not what was done here. The change order of March 17, 1964, executed simultaneously with the construction contract, changed the terms of that contract from the outset, and changed the plans and specifications in a material respect. Clearly, the statute would have been contract different from and less onerous than that which it offered all other bidders. The effect is the

same when this discrimination is accomplished by executing two documents instead of one.

I conclude that the contract awarded to Fabrizio was not awarded in compliance with Section 103(1) of the General Municipal Law. It is therefore void. It follows that the arbitration clause contained in that contract invalid.

In view of this conclusion, it is unnecessary to consider the further question of the effect to be given to the Board's failure to secure timely approval by the State Education Department of the change order or of the new plans and specifications. It is likewise unnecessary to consider the significance of the fact that the contract awarded to Fabrizio for Alternate No. 3, even as amended by the change order, exceeded the amount which the voters had authorized the Board to expend upon that project.

This opinion constitutes the court's findings of fact and conclusions of law.

Defendant Board of Education's motion to compel arbitration is denied.

So Ordered.

EDWARD C. McLEAN U. S. D. J.

Dated: July 6, 1967

ORDER AND DECISION OF RYAN, J. (Dated October 1, 1968)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

FABRIZIO & MARTIN, INCORPORATED,

Plaintiff,

---v---

THE BOARD OF EDUCATION CENTRAL SCHOOL DISTRICT NO. 2 of the Towns of Bedford, New Castle, North Castle and Pound Ridge, Mars Associates, Inc., and Normel Construction Corp. of New Rochelle, a joint venture,

Defendants.

Leslie A. Hynes, Esq., New York, New York, attorney for Plaintiff.

Louis E. Yavner, Esq., New York, New York, attorney for defendants.

RYAN, J.

Plaintiff, a contractor, seeks to recover damages for breach of contract and detention of materials, as well as for the value of services rendered in the construction of a school.

Plaintiff is a Connecticut corporation; defendants are the Board of Education, Central School District No. 2 of the Towns of Bedford, New Castle, North Castle and Pound Ridge, New York, and a joint venture composed of Mars Associates, Inc., and Normel Construction Corp., both New York corporations. Jurisdiction is predicated on diversity of citizenship.

Order and Decision of Ryan, J. .

The complaint pleads six counts or causes of action. The answer of defendant Board alleges seven affirmative defenses and two counterclaims.

Defendant Board now moves for summary judgment dismissing all plaintiff's causes of action and granting it the relief sought in the two counterclaims. Judge Mc-Lean, in a motion by defendant Board to compel arbitration, held on July 6, 1967 that the contract pleaded was void and unenforceable. Plaintiff consents to the dismissal of the first, third and fourth causes of action, based on that contract, leaving for determination the second, fifth and sixth causes of action.

Although before Judge McLean defendant Board defended the legality of the contract and, in fact, precipitated his decision by moving to compel arbitration under it (which was denied by reason of the finding of the invalidity of the contract), it now moves to dismiss the entire complaint and for judgment in its favor upon the ground that this Court lacks jurisdiction over the subject matter because defendant is an agency of the State not suable in the federal court under the Eleventh Amendment save on a federal claim and because defendant Board is not a citizen of the State of New York and diversity of citizenship is not present. The defendant also has pleaded this in its Third Affirmative Defense, which was filed after Judge McLean's decision. If, as defendant alleges, there is no jurisdiction in this Court, then all prior proceedings, including the decision of Judge McLean, are a nullity. It is, therefore, imperative that this be our first determinative of the merits of the claims or defenses.

The first objection to jurisdiction is to be found in the Eleventh Amendment, which divests the Courts of the United States of jurisdiction of suits against any state by citizens of another state. The second objection is that



a State is not a citizen, and that, therefore, a suit between a citizen of one state against another state is not a suit between citizens of different states (Highway Comm. v. Utah Co., 278 U. S. 194; Krisel v. Duran, 386 F. 2d 179). If defendant Board is found to be a civil division of the state, so that in reality the suit is against the state though not named as such, it may not be maintained in this Court. The Eleventh Amendment and Section 1332, U.S.C., Title 28, are clear that the federal court is without jurisdiction if the Board in law is the alter ego of the state; this is so quite independent of the question of its consent or lack of consent to be sued, which affects sovereign immunity. Where jurisdiction is alleged on diversity of citizenship, consent cannot confer jurisdiction where it does not exist (Highway Comm. v. Utah Co., supra; Krisel v. Duran, supra). Although the question of the applicability of the Eleventh Amendment and Section 1332, U.S.C., Title 28, is a federal question, its resolution must turn in part at least on "the characteristics, capacities, powers and immunities of such agency as they are defined by the law of the state." (Fleming v. Upper Dublin Public School District, 141 F. Supp. 813.)

Whether the Board of Education of Central School District No. 2 is an independent, separate corporate entity, capable of citizenship like any other public corporation, or a political subdivision of the State, is to be treated under the New York Education Law creating defendant and the New York decisions defining its status and nature. This but answers part of the problem for even though for state jurisdiction purposes the Board may be sued and exposed to liability in the State courts as a corporate entity, for purposes of federal jurisdiction the federal test goes one step further and requires that the Court look behind the corporate structure and the claim being

asserted to see whether it is the Board or the State who is the real party and whose pocketbook will be affected. (O'Neill v. Early, 208 F. 2nd 286, (4th Cir. 1953); School Board of City of Charlottesville v. Allen, 240 F. 2nd 59, (4th Cir., 1956) cert. den. 77 S. Ct. 667; DeLevay v. Bichmond County School Board, (4th Cir., 1960) 284 F. 2nd 340; Wintel v. Crow (8th Cir., 1963), 309 F. 2nd 744; Fleming v. Upper Dublin Public School District (E.D. 122, 1956), 141 F. Supp. 813; Thurman v. Consolidated School District No. 128 (D.C. Pa., 1950) 94 F. Supp. 616.)

We must be mindful that the question of diversity is distinct from that of sovereign immunity. The fact that numerous actions on claims against the Board of Education have been entertained by the State courts not in the Court of Claims which is the only forum in which the State is amenable to suit, while most persuasive, is not determinative of diversity jurisdiction in the action before us.

We also find that the character and nature of the activities the Board carries on are not determinative of the question for, as this Circuit said in Krisel v. Duran, supra:

"A state may, in its own name or through an alter ego, carry on activities which are traditionally regarded as proprietary functions but neither the state nor its alter ego thereby becomes a citizen for the purpose of diversity jurisdiction" (181) (citing State Highway Commission of Wyoming v. Utah Construction Co., supra).

Here, concededly, the activities out of which this claim arose were governmental.

To sustain jurisdiction, we must find that a Board of Education of a Central School District is a corporate entity sufficiently independent and separate from the State

as to carry its own citizenship, and not by this suit, expose the State to financial or other detriment.

The status of the defendant is defined in the New York statutes:

School districts are not municipal corporations. (General Municipal Law §2, McKinneys Consol. Laws of New York.)

The Education Law, Section 1501, et seq. (McKinney's Consolidated Laws of New York), exempts all school property from taxation. It also provides that money obtained from the sale of school property shall be applied for the benefit of the district as directed by the district voters. It then treats of the formation and dissolution of Common School Districts and Union Free School Districts by a district superintendent, and provides for Common School Districts, and the election of trustees who shall constitute a Board as a "body corporate", holding "as a corporation" all property for the use of the school in the district.

Central School Districts, of which the defendant is one, are treated separately in Sections 1801, et seq., of the New York Education Law. They are formed by order of the Commissioner of Education, who is authorized to lay out Central School Disricts for the establishment of Central Schools to give instruction in elementary and high school subjects within stated boundaries defined by the Commissioner. After entry of the Commissioner's order, the Central School Districts and the Central Schools therein are established by petition and vote of the qualified voters, conducted under the supervision of the Commissioner of Education (Sec. 1802). The Central School District is managed by a Board of Education, whose members are elected, have the same powers and duties as Boards

of Education in Union Free School Districts (see Section 1709, New York Education Law), and, where not inconsistent, are subject to all the provisions of the Education Law or any other general law relating to or affecting Union Free School Districts (Section 1804).

While the Central School District is not declared a body corporate, as is the Union Free School District, it is clothed specifically with all the powers and subject to the same limitations as the Union Free School, which includes authority to pay judgments against the school district by the levying of taxes. The recognition of exposure to judgment and the means with which to satisfy a judgment is recognition of the fact that it is exposed to suit.

It appears conclusively that, although a Central School District engages in the carrying out of a particularly important governmental function which traditionally is the responsibility of the state, it does so as an autonomous agency, at least with respect to the establishment, support, fiscal and business management and control of its schools. The most significant query put by the federal courts to determine who is the real party affected is answered in favor of the Central School District since its funds are used to pay judgments and all operational expenses. The powers and duties which the statute confers upon it recognizes its almost total freedom from State restraint in these matters. Under this test, the Central School District is the real party in interest.

As early as 1922, we find the defendant Board of Education had the power and duty to superintend, manage and control the school (See Section 310 of the New York Education Law, now Section 1709, supra), and was subject to suit in the State Supreme Court for its acts. The language of Pound, Judge of the New York Court of Appeals,

rejecting the contention that defendant was immune from suit because it was a governmental agency, is unequivocal. Judge Pound wrote:

"When the state surrendered to the board a portion of its sovereign power and delegated to it a duty imposed upon the state by the Constitution (Art. IX, §1) and it accepted the trust, it undertook to perform with fidelity the duties which the law imposed upon it. It is not immune from suit... Although it acts in its corporate capacity, it is not absolved from liability as a governmental agency to the extent of the funds vested in it for the purpose by statute or which it is empowered thereby to raise by local taxation." (Herman v. Board of Education, 234 N.Y. 196, 201, 202.)

Since the Board was held not to possess immunity, the question of its consent to suit only in the Court of Claims never arose.

Although defendant recognizes this, it argues also that there is no jurisdiction in the federal courts because the federal courts, for purposes of the Eleventh Amendment, have construed a suit against a Board of Education as a suit against the State (citing O'Neill v. Early, supra; School Board of City of Charlottesville, Va. v. Allen, supra; and other decisions following that holding cited by the Board.)

A reading of these decisions discloses that, by applying the test of whose funds would be used to pay a judgment and who was, therefore, the party to benefit or suffer, the Courts concluded that the school boards or districts being sued were, in reality, the State or commonwealth and, therefore, not subject to suit in the federal courts because they lacked the requisite citizenship to confer jurisdiction.

Thus, in O'Neill v. Early, supra, where it was alleged that the Board was an administrative department of the State of Virginia, the Court dismissed the suit on a finding that, in fact, it was an agency of the State sought to be held liable to judgment payable out of public funds. DeLe ay v. Richmond School Board, supra, and County Sc. ... Board of Arlington Co. v. Thompson, 240 F. 2d 59, cm denied 313 U.S. 911, recognized this as the controlling factor. Theming v. Upper Dublin Public School District, suora, reached the same conclusion based on local law decisions which held that even though the school district was a body corporate, a quasi-municipal corporation, it was but an agency of the State performing governmental functions and, since it was the Commonwealth, not suable in the federal or state courts. Wihtol v. Crow, supra, held the school district an instrumentality of the State performing governmental functions at State expense. To these holdings, we subscribe.

Once we find that the defendant is not the State of New York, we must find that it is a New York corporation and, there being diversity of citizenship, there is no ground for urging that it may not be sued in the federal court. The defendant, like any other defendant, may not immunize itself from suit, if the jurisdiction is present (Geer v. Emrick, 283 F. 2nd 293, cert. denied 365 U.S. 817). This conclusion does no violence to the local policy of New York for, as we have seen, these boards have been uniformly subjected to suit in the State courts in tort as well as in contract. There is no reason for this Court's declining jurisdiction, even if it could.

We turn now to a consideration of the other grounds urged by defendant for dismissal of the Second, Fifth and Sixth causes of action, and for summary judgment in its favor on its Fourth and Fifth counterclaims which allege

illegality of the contract, release and waiver and failure to file written verified claims. In the alternative, defendant seeks an order of this Court specifying the facts that appear "without substantial controversy."

The Second cause of action, solely against defendant Board, is to recover \$182,402.85, representing extra work and material furnished by plaintiff at the request of defendant. It realleges the first six paragraphs of the First Cause of Action (which is dismissed), pleading that on March 17, 1964, plaintiff, the prime contractor, and the defendant entered into the prime contract to furnish the materials and construct the Bedford Middle School; that plaintiff proceeded to perform and carry out the terms of the prime contract, except as such performance was interfered with and prevented by the acts of defendant; it also alleges the timely presentation of written verified claims by plaintiff and the lapse of 30 days since their presentation.

The Fifth Cause of Action against the defendant Board and the Joint Venture again alleges the execution and performance by plaintiff of the March 17, 1964 contract and its unlawful termination by defendant, and recites further that, while plaintiff was engaged in the performance of its prime contract, defendant on March 6, 1966 in breach of the contract terminated further performance of it by plaintiff and that plaintiff was ready and willing then and at all times to complete its performance of the prime contract. (These are allegations taken from the Fourth Cause of Action, which is also dismissed because it is based on the contract.) Here, again, plaintiff pleads due notice of claim and then goes on to allege that, after the Board

¹ Defendant has not filed a Rule 9-g statement.

terminated the contract, it refused to permit plaintiff access to the job site, in order to recover and remove the plaintiff's materials; that the joint venture has been using these materials and tools and that defendants continue to wrongfully detain them to plaintiff's damage in the sum of \$66,904.02, their alleged value.

The Sixth Cause of Action against the Board alone realleges the timely presentation of written verified claims by plaintiff and the lapse of more than 30 days before the commencement of suit, and then pleads a claim in quantum meruit on the following facts: that between March 17, 1964 and March 8, 1966, plaintiff at the special instance and request of defendant performed work, labor and furnished services and materials in the construction of the Bedford Middle School, reasonably worth the sum of \$2,762,379.04; that this amount became due and owing to plaintiff and that, although demanded, only the sum of \$2,120,756.91 has been paid to plaintiff, leaving the balance due of \$641,622.13.

The First and Second Defenses are general denials, except that they admit the execution of the prime contract on March 17, 1964 and the payment to plaintiff of the amount alleged. The defenses also admit the Board's refusal to allow plaintiff's employees to remove materials and tools from the job site, and the use by the joint venture of certain material, tools, etc. "in accordance with the terms and provisions of the contract between plaintiff and defendant Board."

The Fourth Defense and counterclaim pleads the invalidity of the prime contract under New York General Municipal Law, and the decision of Judge McLean so holding, and seeks recovery of the payments made to plaintiff from April 29, 1964 to February 14, 1966, totalling

\$2,131,859, with interest, which payments the Board alleges were ultra vires and void.

The Fifth Defense and counterclaim realleges the making of the contract and the various breaches by plaintiff prior to January, 1965, and the giving of notice by the Board of its intent to terminate the contract. It then alleges the making by the parties of a supplemental agreement on March 23, 1965, under which plaintiff waived ail prior claims for extra work, undertook to indemnify defendant from claims by others, and agreed to complete the balance of the work by a certain date or pay specified liquidated damages which the Board might deduct from any amounts due plaintiff. Here, the Board also pleads the failure of plaintiff to furnish a written verified claim to the Board prior to action in accordance with Section 3813 of the New York Education Law; and alleges further breaches by plaintiff of both the prime contract and supplemental agreement by reason of which the defendant was compelled to complete the job itself and to employ others to perform work, labor and services to its damages in the sum of \$410,000.

The Sixth Partial Defense of the Board pleads release by plaintiff of all claims arising prior to the execution of the supplemental agreement.

The Seventh Defense interposed by both defendants to the Fifth Cause of Action pleads the legality of the detention of plaintiff's tools and materials, the provisions of the Education Law and the General Municipal Law of the State of New York, and the provisions of the prime contract and of the supplemental agreement. Defendant Mars in this Seventh Defense pleads that, under its completion contract with the Board, it was required to use the plaintiff's materials; that plaintiff knew this and made no claim

107a

Order and Decision of Ryan, J.

of ownership until it filed the action. The defendant contends that plaintiff, therefore, is barred by laches from prosecuting this claim.

Defendant Board seeks a judgment on its two counterclaims for \$2,131,859 with interest from the date of payment to plaintiff, and for \$410,000 with interest from March 7, 1966.

The reply to the two counterclaims, which was served after the submission of this motion, denies most of these allegations, including the illegality of the contract. Although the reply admits the decision of Judge McLean holding the contract invalid and unlawful, it denies that the Board may not legally pay plaintiff. The reply also denies that the Board has been damaged by the payments made to it. The plaintiff in the reply admits the making of a supplemental agreement, but pleads its illegality, alleging that it was part of the prime contract. Affirmatively plaintiff in its reply alleges that it was fraudulently misrepresented by defendant Board to plaintiff that the prime contract was valid and legally binding, that plaintiff relied on the truth of this representation and that defendant is estopped from asserting the defense of illegality. The reply concludes with the allegation that the completion contract between defendants is void under the bidding provisions of the State statutes.

Although in this consideration of the motion before us we presume familiarity with Judge McLean's decision, it is necessary for our determination here to note that the basis of his holding—that the prime contract entered into between plaintiff and the defendant Board was void and illegal—lay in his finding that it had not been let out in accordance with competitive bidding requirements of Section 103(1) of the New York General Municipal

Law, which directs that a contract shall be awarded to the lowest responsible bidder after advertising for sealed bids. What had taken place was that, when the lowest bidder withdrew its bid after the Board had advertised for sealed bids in keeping with the statutory provisions, the contract was awarded to plaintiff Fabrizio, the next lowest bidder, and that, simultaneously and without authority, the Board changed the specifications of the contract to omit work on the part of Fabrizio to the extent of \$172,677. Fabrizio, prior to the award to him, had sought to raise his bid, after the bids were in, by \$172,677. The effect of these changes, Judge McLean held, changed the original bid and original specifications without giving other bidders the opportunity to bid on the job with changed specifications. In addition, Judge McLean found that the Board had signed a contract for the building of an athletic track (Alternate No. 3) for a price of \$99,000, which was \$4,000 more than had been authorized by the voters of the District. This, as in the reduction of the \$172,677 item, was given the appearance of regularity by a change order executed without approval of the State Education Department as required by law. The Department had, under statute, prior to the advertising of the bids, approved the original plans and specifications upon the basis of which the contractors filed their original bids. Judge McLean found that the change order was not submitted to the State Education Department, if at all, until three days before he conducted the hearing on the contract's legality. With respect to the change order on the athletic track, Judge McLean found that plaintiff Fabrizio had already been paid \$98,000 for this work.

We must also note that Judge McLean declined to consider whether the changes in the plans and specifications or the change in the athletic track had affected the value

of the school, or whether they had saved money for the Board or provided equivalent facilities. All that he decided, and all that was before him, was whether the contract was valid, and he held that, under New York statutory law and the cases interpreting it (citing Gerzof v. Sweeney, 16 NY 2d 36), it was not.

There was no appeal from Judge McLean's decision denying decendant's motion for a stay of the suit and to compel arbitration.

Plaintiff, by its consent to dismissal of the three causes of action arising out of the contract, and defendant, by its motion for summary judgment in its favor to recover the payments, acknowledges the finality of that decision. We agree with Judge McLean that New York law and the undisputed facts dictated the holding that the contract was null and void.

Judge McLean never reached the question of remedies remaining available to the parties, and it is that which is presented on the present motion.

In the first decision in Gerzof v. Sweeney, supra, Judge Fuld had held that in a taxpayer's suit to annul the contract and restrain its performance by the village or for damages, a contract whose specifications were so drawn as to preclude competitive bidding other than by defendant Nordberg Manufacturing Co. was void and illegal and to be set aside without showing injury to the village.

The second decision of the New York Court of Appeals in Gerzof v. Sweency, N. Y. 2nd, rendered in 1968 since this motion was submitted, deals precisely with the question of remedies after the contract had been found void because in violation of the bidding statute (New York General Municipal Law, Section 103).

110a

Order and Decision of Ryan, J.

Upon the remand of "Gerzof" to the Supreme Court by the Court of Appeals for the entry of judgment for plaintiff taxpayer in accordance with the opinion, that Court held a hearing on assessment of damages (52 Misc. 2nd 505). The question presented was whether defendant contractor, who had been fully paid, should make restitution of all moneys received as well as respond in damages for payments incidental to the void contract, such as the interest on the bond issue, disbursements in connection with the letting and bidding of the contract, and costs incurred in installing the Nordberg generator. The real damages, it found, were the payments made to Nordberg for the generator, and it decreed that the Village should retain the generator as well as recover the purchase price of \$757,625 which had it paid, but not the incidental expenses because there was insufficient evidence to allocate them to the Nordberg generator which was a part of an overall modernization project. It did allow counsel fees to plaintiff against all defendants.

Answering Nordberg's defense that equitable considerations applied because the village has received value for its money and no loss to the village has been shown, and that the village might not retain the generator and, at the same time, recover back the amounts paid, the trial court on remand made the following holdings:

"The law respecting municipal contracts in this jurisdiction is clear. By statute (General Municipal Law, §103) moneys may not be expended without lawful authorization... The Court of Appeals has held that the instant contract was unlawful and invalid. It therefore follows that no payment made or received thereunder was lawful. (Albany Supply & Equip. Co. v. City of Cohoes, 25 A. D. 2d 700) (p. 506)

"Therefore damages are found to be the sums paid to Nordberg and Nordberg will be directed to make restitution of such sums. . . .

"Permitting the village to retain the generator and directing repayment of the sum illegally paid indeed a harsh result. Nevertheless the law clear, and to permit literal application of equitable principles in this case would invite the cvils the statute is obviously intended to prevent. This is a result the courts of his State have not countenanced, notwithstanding the views held in other jurisdictions (Albany Supply & Equip. Co. v. City of Cohoes, 25 A. D. 2d 700, supra; Lutzken v. City of Rochester, 7 A. D. 2d 498). (p. 509)."

And it reminded defendant that the Court of Appeals

"has given emphatic warning that equitable powers of the courts may not be invoked to sanction disregard of statutory safeguards and restrictions. (See also, Lutzken v. City of Rochester (7 A. D. 2d 498). Removal of the generator unit will not be allowed. (p. 507) . . .".

On cross appeals, the Appellate Division of the State Supreme Court modified the judgment by providing that, while Nordberg was to pay back the purchase price of the generator, it could retake it upon posting a bond of \$350,000 to secure the village against any damages stemming from the removal and replacement of the equipment and directed that the counsel fees be paid solely by Nordberg.

When presented once again to the Court of Appeals on the appeal from the Appellate Division, Chief Judge Fuld

held that, while there was justification and precedent for the decision of the trial court, the amount to be awarded to the Village while permitting it to retain the generator should be something less than the full purchase price, to wit, the actual money damages resulting to the Village from the purchase and installation of the Nordberg generator with interest from that time. The Court recognized that in reaching this decision it was straying from the established principle which it repeated in the clearest of terms:

> "We have not previously been called upon to fashion a remedy appropriate to a case such as this, where an illegal and void contract for public work, entered into in defiance of the competitive bidding statute (General Municipal Law, §103) has been performed in full on both sides. We have, however, dealt with the situation, one step removed, in which the municipality has consumed or had the full benefit of illegally purchased goods or services but the vendor or supplier has not been paid. We have repeatedly refused, in such cases, to allow the sellers to recover payment either for the price agreed upon or in quasi-contract. One of our salient purposes in adopting this rule has been to deter violation of statutes governing the spending of public monies for goods and services. The restrictions imposed by such legislation, we recognized, are designed as a safeguard against the extravagance or corruption of officials as well as against their collusion with vendors. If we were to sanction payment of the fair and reasonable value of items sold in contravention of the bidding requirements, the vendor, having little to lose,

would be encouraged to risk evasion of the statute; by the same token, if public officials were free to make such payments, the way would be open to them to accomplish by indirection what they are forbidden to do directly. (See, e.g., Albany Supply & Equip. Co. v. City of Cohoes, 18 NY 2d 968, affg. 25 A. D 2d 700; Seif v. City of Long Beach, 286 N. Y. 382, 387-388; People ex rel. Coughlin v. Gleason, 121 N. Y. 631; Dickinson v. City of Poughkeepsic, 75 N. Y. 65, 74-75; McDonald v. Mayor, 68 N. Y. 23, 28; Lutzken v. City of Rochester, 7 A. D. 2d 498; cf. Jered Contr. Corp. v. New York City Tr. Auth., 22 NY 2d ——.)²

"There should, logically, be no difference in ultimate consequence between the case where a vendor has been paid under an illegal contract and the one in which payment has not yet been made. If, in the latter case, he is denied payment, he should, in the former, be required to return the payment unlawfully received-and he should not be excused from making this refund simply because it is impossible or intolerably difficult for the municipality to restore the illegally purchased goods or services to the vendor. In neither case can the usual concern of equity to prevent unjust enrichment be allowed to overcome and extinguish the special safeguards which the Legislature has provided for the public treasury. Although this court has not had occasion to pass on the question, appellate courts of at least two other states have so decided, holding that the vendor must pay back the amount received from the purchaser even though the items sold are not capable of being returned (see County of

114a

Order and Decision of Ryan, J.

Shasta v. Moody, 90 Cal. App. 519, 523-524; McKay v. Town of Lowell, 41 Ind. App. 627, 638), and we strongly favor this view. Only thus can the practical effectiveness and vigor of the bidding statutes be maintained. (Slip opinion)

The Court of Appeals, notwithstanding its prior holdings, proceeded to fashion what it considered an equitable result because it concluded that it could do so "without disturbing the salutary rationale and policy underlying such decisions as Albany Supply & Equip. Co. v. City of Cohoes, 18 N. Y. 2nd 968." The "sheer magnitude of the forfeiture" suffered by the defendant and the "corresponding enrichment" to the Village of Freeport were the "unusual circumstances" which impelled the Court to deviate from the principles it long had enunciated:

"The purposes of our competitive bidding statutes may be fully vindicated here without our rendering so Draconian a decree as to subject the defendant Nordberg to a judgment for over three quarters of a million dollars. Justice demands that even the burdens and penalties resulting from disregard of the law be not so disproportionably heavy as to offend conscience." (Slip opinon)

The Albany case cited by Judge Fuld held that:

"Although other jurisdictions may recognize a claim upon a quantum meruit or quantum valebat, even though there were irregularities or defects in the method of contracting for the services, it is clear that such is not the law in this state." Lutzken v. City of Rochester, 7 A D 2d 498 quoted in Albany Supply & Equipment Co. v. City of Cohoes, 25 A D 2d 700, aff'd 18 NY 2d 968.

Although Judge Fuld did not apply this principle in the case of a fully performed contract, his reaffirmance of Albany principles makes it clear that, in a suit predicated upon an unexcuted or partly executed contract, the New York law remains as previously enunciated.

It follows, therefore, that any claim being pressed by plaintiff or which emanates solely from the illegal contract whether under it or in quantum meruit, must be stricken as unenforceable.

The Second Cause of Action, as we have seen, is brought to recover for the "fair and reasonable value" of "extra and additional work, labor and services and . . . extra and additional material" furnished at the request of defendant. It realleges the execution of the prime contract and the timely presentation of verified claims "setting forth the claims stated herein." On its face this cause of action is to recover for extras performed under the prime contract in the construction of the school which was the subject matter of the invalid contract. The notice of claim, which sets forth this claim "for losses, increased costs . . . changes in the work to be performed under the contract, for deficiencies in the contract drawings and/or specifications . . . and changed conditions" states that the claims set forth are being made "in connection with the contract entered into" by the parties on March 17, 1964. The contract contained specific provisions relating to extra work and changes which the owner might order and provides that the "contract sum" is to be adjusted accordingly and that "all such work shall be executed under the conditions of the original contract." (Articles 3 and 15 of the General Conditions.) The attempt to alternatively plead in "quantum meruit", even if it could convert this contract claim into one in quantum meruit, would not save it since, first, plaintiff may not under Gerzof

v. Sweeney recover in quantum meruit under an invalid contract and, second, since the contract itself, if valid, provides that extras are part of the contract and to be recovered only under the contract price as adjusted. The Second Cause of Action must be dismissed as insufficient in law.

We take up the Sixth Cause of Action and we conclude that, under the New York Court of Appeals holdings, that, too, must fall. This claim is in quantum meruit for services performed in the construction of the school at the request of defendant during the existence of the prime contract and supplemental agreement. It also alleges the timely presentation of claims which, as we have seen, were made "in connection with the contract." It pleads the payment to plaintiff of \$2,120,756.91, which was the money paid to plaintiff under the prime contract, as pleaded in the First Cause of Action. Like the Second Cause of Action, it is a claim to recover for the performance of plaintiff under the invalid contract and may not be asserted.

The Fifth Cause of Action is for wrongful detention of plaintiff's material as a result of defendant's unlawful termination of the contract. The notice of claim which was made "in connection with the contract" recites that it is for "improperly and unlawfully prohibiting Fabrizio & Martin, Incorporated, from removing its materials, tools and appliances from the job site after the Board of Education improperly and unlawfully terminated the contract of Fabrizio & Martin, Incorporated . . .". Although plaintiff now says that this claim sounds in tort, it was asserted at a time when the contract was claimed to be valid by both plaintiff and defendant, when plaintiff was seeking clamages solely for breach of contract with the Board as evidenced by the entire complaint and the notice of claim,

which notice of claim relates only to the March 17, 1964 contract, but which plaintiff alleges embraces this 5th claim. Moreover, the defense to this claim for detention is based on the terms of the contract, which defendant said contained specific provisions for removal and detention and further use of plaintiff's materials and tools.

As Judge Fuld pointed out in Gerzof, if a contractor under an invalid contract could recover on quantum meruit, he would be encouraged to risk evasion of the statute. Certainly, the same can be said if he were permitted to convert a contract claim into one sounding in tort in order to evade the statutory policy. The Fifth Cause of Action arises out of and is founded on the illegal contract and may not be asserted. However, this item of damage may be weighed and considered under the defendant's Fourth counterclaim, to which we now turn.

The Fourth and Fifth counterclaim upon which defendant seeks summary judgment present the crux of this litigation. As we have seen, the Fourth counterclaim seeks recovery of the contract price so far paid to Fabrizio. Under the philosophy of Gerzof v. Sweeney, supra, while defendant may not under the Fourth counterclaim recover the entire amount it has so far paid Fabrizio, it may well recover from Fabrizio some of this money under the "Gerzof" guidelines.

We hold that, if the Court was of the opinion there that restitution of \$757,625 by Nordberg was a forfeiture to him and an enrichment to the Village of such magnitude as to call for equitable intervention, it would be loath here to compel the repayment by plaintiff of over two million dollars without an inquiry into the merits. This action has not been tried; we are not in a position to know whether the Board received a benefit which

might be found to be an "enrichment". Those are matters which must be resolved at trial.

Insofar as the Fifth counterclaim seeks damages flowing from breach of the prime contract and supplemental agreement by plaintiff, it cannot stand: the prime contract, because it has been held illegal; the supplemental agreement because it depended for its existence on the continued validity of the prime contract. However, insofar as the Board seeks to recover damages incurred by it in being compelled to complete the school, it may well appear at trial that this is an item of damages recoverable under "Gerzof". Here, too, summary judgment cannot now be granted for the claim raises factual issues.

In sum, we hold that any claim or defense resting on the illegality of the contract is available to defendant; that it may not plead breach of the prime contract or supplemental agreement or release and waiver under either or failure to present verified claims; and that the issues remaining for determination are the damages which the Board suffered as a direct consequence of the illegal contract, including but not limited to the items enumerated by the Court of Appeals in "Gerzof".

Motion to strike the complaint is granted; motions for summary judgment on the Fourth and Fifth counterclaims are denied. So ordered.

Dated: October 1, 1963.

SYLVESTER J. RYAN, U.S.D.J.

OPINION OF

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT.

No. 24-September Term, 1971.

(Argued September 15, 1971. Decided December 15, 1971.)

Docket No. 35086 :

THE BOARD OF EDUCATION CENTRAL SCHOOL DISTRICT NO. 2, OF THE TOWNS OF BEDFORD, NEW CASTLE, NORTH CASTLE AND POUND RIDGE,

Plaintiff-Appellant,

-against-

AETNA CASUALTY AND SURETY Co.,

Defendant-Appellee.

Before:

Moore, SMITH and HATE,

Circuit Judges.

Appeal from a judgment of the United States District Court for the Southern District of New York, Inzer B. Wyatt, Judge, granting a motion for summary judgment dismissing the complaint and denying plaintiff's crossmotion for summary judgment.

Reversed and remanded.

ROBERT N. SHIVERTS, New York, N. Y. (Louis E. Yavner, New York, N. Y., of counsel), for Plaintiff-Appellant.

DAVID A. TRAGER, New York, N. Y. (Max E. Greenberg and George N. Toplitz, New York, N. Y., Max E. Greenberg, Trayman, Harris, Cantor, Reiss & Blasky, New York, N. Y., of counsel), for Defendant-Appelles.

Moore, Circuit Judge:

This is an appeal by the Board of Education Central School District No. 2, of the Towns of Bedford, New Castle, North Castle and Pound Ridge (the Board), from a judgment granting the Aetna Casualty and Surety Co.'s (Aetna) motion for summary judgment dismissing the complaint and denying the Board's cross-motion for summary judgment.

The sole issue on this appeal is whether the District Court was correct in stating that Actna could not be liable on any cause of action brought by the Board because New York law absolves a surety of all liability on a performance bond once it has been determined that the principal's construction contract was illegal because it was not let in conformity with the New York State competitive bidding statute. For the reasons stated below, we find that the District Court was in error. The judgment is therefore reversed insofar as the Board's complaint was dismissed and the case is remanded for proceedings consistent with this opinion.

The Facts

In November 1963 the Board published an advertisement requesting bids for the general construction and site work

¹ N. Y. General Municipal Lew \$103(1).

for its Middle School.2 Six bids were submitted. The three lowest bids were as follows:

Contractor	er.	Base Bid
Rand Construction Co.	**.**	\$2,276,800
Fabrizio & Martin, Inc.		\$2,326,900
Walter A. Stanley Construction	Co.	\$2,549,000

. . .

The contract was awarded to the Rand Construction Co. in January 1964. Subsequently, the Rand Co. asked to withdraw its bid because it had made an error in computation. The Board consented.

The contract was then awarded to Fabrizio & Martin, Inc. (Fabrizio), the next lowest bidder. However, Fabrizio also discovered a mathematical error in its computation, which it claimed had been understated in the amount of \$171,000. Fabrizio also asked either to withdraw or correct its bid.

Fabrizio's request was followed by a series of meetings, letters and telephone calls between representatives of Fabrizio and the Board during which it was decided to change the plans and specifications to compensate for the error. The changes were made with the consent of the Board, the Board's attorney, the architect and Fabrizio. To effectuate the changes, a change order was signed on March 17, 1964. The Board, however, did not submit the change order to the State Education Department for approval, as it was required to do, until June 1967.

At the same time that the change order was signed, the Board and Fabrizio entered into a general construction contract which incorporated the change order. Pursuant to the contract, Fabrizio as principal, and Aetna as surety, executed a performance bond and delivered it to the Board

² This procedure was in conformity with N. Y. General Municipal Law \$103(2).

as obligee. Thereafter Fabrizio commenced work on the school. The pertinent provisions of the bond in issue before us are:

"Whereas, Contractor has by written agreement dated March 17, 1964 entered into a contract with Owner for general construction and site work for the Middle School Bedford, New York in accordance with drawings and specifications prepared by the Architects Collaborative, Cambridge, Mass. which contract is by reference made a part hereof and is hereinafter referred to as the Contract.

"Now, Therefore, the Condition of this Obligation, is such that, if the Contractor shall promptly and faithfully perform said contract, then this obligation shall be null and void; otherwise it shall remain in full force and effect." (emphasis supplied)

On March 23, 1965, as a result of a dispute between the Board and Fabrizio, a supplemental agreement was executed. Actna, as surety, took part in the discussions leading up to this agreement and consented to it.

About one year later, Fabrizio notified the Board of its intention to cease further construction of the school. The Board responded by declaring Fabrizio in default. Aetna was notified of the default and was requested to make arrangements to complete the work. The request was refused. Subsequently, the Board relet the unfinished portions of the work to other contractors who completed the school.

Prior Proceedings

Fabrizio commenced an action against the Board in the Southern District of New York, Docket No. 66 Civ. 2935, seeking to recover damages for alleged breach of contract,

detention of materials and for the value of services rendered in the construction of the school. The complaint stated six causes of action. Each one of them was premised on an alleged breach of contract or on a theory of quantum meruit. Prior to serving or filing its answer the Board moved to stay the action pending arbitration. Argument on this motion was before Judge McLean, United States District Judge for the Southern District of New York.

In ruling on this motion, Judge McLean found that the effect of the change order on the original plans and specifications was such that the Board should have requested new bids on what was essentially a new contract in order to conform to the requirements of the New York State competitive bidding statute. Since all would-be bidders were denied an opportunity to submit their bids, the contract was held to be illegal and thus invalid. The Board's motion to compel arbitration was therefore denied on the ground that the arbitration clause in the invalid contract was also invalid. No appeal was taken from this decision. The decision is unreported but is see forth in the appellant's appendix, 48a-73a.

After Judge McLean's decision was rendered, the Board served its answer to Fabrizio's complaint. The answer contained seven affirmative defenses and two counterclaims. In pertinent part, the Board's defenses alleged the invalidity of the contract and cited Judge McLean's decision. One counterclaim sought recovery of all money paid to Fabrizio and the other sought damages caused by Fabrizio's breach of contract. The Board then moved for summary judgment dismissing the complaint and granting the relief sought in the counterclaims. Argument on this motion was

Fabricio & Martin Inc. v. The Board of Education Central School District No. 2, etc., Docket No. 66 Civ. 2935 Motion No. 86 (S.D.N.Y. Feb. 21, 1967).

presented to Judge Ryan, District Judge, for the Southern District of New York.4

In dismissing Fabrizio's complaint, Judge Ryan first stated that he agreed with Judge McLean's ruling that the contract, having been awarded in violation of the New York State competitive bidding statute, was invalid. He then held, on the basis of the New York Court of Appeals decision in Gerzof v. Succeey, 22 N.Y.2d 297, 239 N.E. 2d 521 (1968), that Fabrizio could not base any recovery against the Board on the invalid contract whether it alleged breach of contract or quantum meruit but that the Board was entitled to recover such damages as it might establish.

A trial was ordered to determine the extent of the Board's recovery. This action is presently pending. Fabrizio appealed from the dismissal of three of its six causes of action. The appeal was dismissed because it was not an appeal from a final order.

With respect to the Board's Fourth and Fifth counter-claims, which Judge Ryan characterized as the "crux" of the litigation, he held that "Under the philosophy of Gereof v. Sweency, supra, while defendant may not under the Fourth counterclaim recover the entire amount it has so far paid Fabrizio, it may well recover from Fabrizio some of this money under the 'Gerzof' guidelines," but he also held that the Court "... would be loath here to compel the repayment by plaintiff of over two million dollars without an inquiry into the merits." (Fabrizio, supra, 290 F. Supp. at 956).

Thus far the Fabrizio-Board litigation has produced two decisions (1) arbitration has been denied because the construction contract containing the arbitration clause was illegal; and (2) Fabrizio cannot recover from the Board under the illegal contract. Still open for decision is Fab-

⁴ Pabricio & Martin Inc. v. The Board of Education Central School District No. 2, 290 F. Supp. 945 (S.D.N.Y. 1968).

rizio's liability to the Board. It was to cover any such potential liability that the Board required and Fabrizio sought and paid for Aetna's monetary guarantee of prompt and faithful performance.

The Present Action

The Board, seeking to hold Aetna liable on its performance bond, commenced the instant action in the Westchester County Supreme Court of New York. A petition by Aetna pursuant to 28 U.S.C. §1332 to remove the action to the Federal Court was granted. As noted, the Board's complaint was dismissed on Aetna's motion for summary judgment on the theory that Aetna, as surety, was absolved of all liability because the construction contract was invalid. This ruling is at issue here.

The Trial Court's Opinion

The Trial Court on Aetna's motion for summary judgment concluded that since the March 17, 1964 contract between the Board and Fabrizio "was null and void, the surety Aetna is not liable on a performance bond of that same contract." The Board of Education, Central School District No. 2, etc., v. Aetna Casualty & Surety Co., Docket No. 68 Civ. 1162 (S.D.N.Y. May 11, 1970). For New York law, the Court relied on Village of Medina v. Title Guaranty & Surety Co., 152 A.D. 307, 136 N.Y.S. 786 (4th Dept. 1912), aff'd, 211 N.Y. 24, 104 N.E. 1118 (1914) and Kent v. Thornton, 179 Misc. 593, 39 N.Y.S. 2d 435 (Sup. Ct. Chautauqua County), aff'd, 265 A.D. 904, 38 N.Y.S. 2d 573 (4th Dept. 1942), and decisions of courts in other States. The Court rejected Gerzof because the Gerzof theory of liability did not affect Aetna, as surety, in any way.

Gerzof v. Siceeney

This case must be considered in relation to Judge Ryan's decision in the action brought by Fabrizio against the

Board and the counterclaims by the Board against Fabrizio. In an endeavor to ascertain applicable New York law, Judge Ryan relied heavily on Gerzof v. Sweeney, supra.

Gerzof was a taxpayer's action against the Mayor of the Village of Freeport to annul a contract with Nordberg Manufacturing Co. for the purchase and installation of electric power equipment, primarily a generator. Because of violations of New York's competitive bidding statute, the contract was held to have been illegal. The Village Board of Trustres had awarded to Nordberg the contract for a large rand more expensive generator based on specifications drawn by Nordberg which only Nordberg could fulfill. The Court of Appeals held the contract illegal and directed that judgment be entered in plaintiff's favor. 16 N.Y.2d 206 (1965).

On the trial with respect to damages, the trial court decreed that the generator remain the property of the Village and that the Village recover from Nordberg the purchase price of the generator, \$757,625.

The Appellate Division modified the judgment to the extent of giving Nordberg the option of recovering the generator upon posting a bond to indemnify the Village for damages incurred thereby. On review by the Court of Appeals that court was "concerned only with the question of remedies" (p. 302) in a case "where an illegal and void contract for public work, entered into in defiance of the competitive bidding statute (General Municipal Law, §103) has been performed in full on both sides." (p. 304).

The Court then proceeded to fashion relief based upon equitable principles, saying:

"Ordinarily, the application of the law to particular cases may not, of course, vary with the sums involved. But we must recognize that the rule with which we

are concerned has unique aspects that make it appropriate for us to take into account the severity of its impact in cases as extreme as the present one. The purposes of our competitive bidding statutes may be fully vindicated here without rendering so Draconian a decree as to subject the defendant Nordberg to a judgment for over three quarters of a million dollars. Justice demands that even the burdens and penalties resulting from disregard of the law be not so disproportionately heavy as to offend conscience." (p. 306).

A similar approach is justified in this a fortiori case where the amount involved is over two million (not threequarters of a million) dollars. In Gerzof the wrong was done to the Village of Freeport by the connivance of Nordberg and the Village officials; in our case to the taxpayers by the connivance of Fabrizio and the Board. The New York Court of Appeals resorted to a "remedy, lying well within the domain of equity" (p. 307) and decreed that the damages recoverable from Nordberg should be measured by the difference in price between the smaller generator offered by Nordberg's competitor, namely, \$615,685 and the Nordberg generator, namely, \$757,625 plus \$36,696, the installation cost difference-in other words, the additional expense to the Village. While the question of the . principal's liability, if any, under Gerzof, is pending but undecided, it would be premature at this juncture for this Court to try to set anticipatory "guidelines" until the facts are fully developed upon a trial on the merits.

Aetna's Liability

Judge Ryan held that in the Fabrizio-Board action that "... insofar as the Board seeks to recover damages incurred by it in being compelled to complete the school, it may well appear at trial that this is an item of damage

recoverable under 'Gerzof'," and that " . . . the issues remaining for determination are the damages which the Board suffered as a direct consequence of the illegal contract, including but not limited to the items enumerated by the Court of Appeals in 'Gerzof'." (p. 956). In other words, nutil a judgment, if any, is rendered for damages, if any, against Fabrizio and in favor of the Board, there is no way of determining whether the condition of the surety bond has been met. It is abundantly clear from Judge Ryan's decision that he did not hold that Fabrizio could not under any circumstances be liable to the Board for damages. Damages could only have been incurred in connection with the construction of the school and it was for proper performance of this construction work that Actna stood surety. Nor did the Judge hold that the Board's counterclaims must be dismissed although the contract's invalidity prevented Fabrizio from recovering. He held quite to the contrary. Had the invalidity of the contract prevented the Board from obtaining any recovery for damages against Fabrizio, Aetna's contention might have greater merit.

The contract now before us is Aetna's surety bond. Therein the obligation was to insure that Fabrizio would "faithfully perform said contract."

Judge Ryan, relying on Gerzof, directed a trial in the Fabrizio-Board action for the determination of "the damages which the Board suffered as a direct consequence of the illegal contract." (Fabrizio, supra, 290 F. Supp. at 956). Although this decision removes Aetna's premise of no liability under a void contract, it does not establish the nature or extent of the damages, if any, recoverable by the Board against Aetna. Such a determination can only be made after full development of the facts relating to the underlying equities, vis-a-vis the Board and Aetna.

129a

Accordingly, the action is remanded to the District Court with instructions to consolidate it with the pending Fabrizio-Board action, and making Aetna an additional party with respect to the Board's counterclaim against Fabrizio so that all the facts bearing upon the rights of the parties may be adduced.

PRE-TRIAL ORDER (Dated October 17, 1972)
UNITED STATES DISTRICT COURT

130a

SOUTHERN DISTRICT OF NEW YORK

FABRIZIO & MARTIN, INCORPORATED, :

Plaintiff, ::

-against-

THE BOARD OF EDUCATION CENTRAL SCHOOL DISTRICT NO. 2 OF THE TOWNS OF BEDFORD, NEW CASTLE, NORTH CASTLE and POUND RIDGE, MARS ASSOCIATES, INC. and NORMEL CONSTRUCTION CORP. OF NEW ROCHELL, a joint venture,

PRE-TRIAL ORDER

Index No. : 66 Civ. 2935

Defendants,

-and-

AETNA CASUALTY AND SURETY CO.,

Additional Defendant on the Counterclaim of defendant The Board of Education.

On , 1972, the parties to this action or their attorneys appeared before the Court at a pre-trial conference pursuant to Local Calendar Rules 6 and 13 and Rule 16 of the Federal Rules of Civil Procedure and the following action was taken.

- 1. It is ordered that the following amendments to the pleadings be allowed:
- (a) Paragraph 51 of the answer of the defendant Board of Education "First Counterclaim" be amended to read as follows:

"51. By reason of the foregoing, substantial completion of the building units comprising Middle School was delayed, and defendant Board was compelled to and did complete said job itself, and to employ the services of others in completing the same, and all to its damage in the sum of \$496,890.00."

(Plaintiff and Additional Party Defendant, Aetna, agree to the amendment, without prejudice to their position that the amendment is insufficient as a matter of law by reason of the decision and order of Ryan, J. dated October 1, 1968.)

(b) The Reply of the plaintiff be amended to include the following setoff:

"AS AND FOR A FIFTH DEFENSE AND SETOFF TO COUNTERCLAIMS OF DEFENDANTS.

> "That before and at the time of the commencement of this action, defendant Board was indebted to the plaintiff in the sum of \$2,829,283.06 of which only \$2,120,756.91 has been paid, leaving a balance still due and owing of \$708,526.15 for work, labor and services performed and material, equipment and supplies furnished in connection with the construction of the Bedford Middle School, out of which said sum of money, so due to the plaintiff, it hereby offers to set off to the defendant Board so much as will be sufficient to satisfy the alleged damages of the defendant Board, if any, in respect to the alleged matters complained of."

(Defendant Board agrees to the amendment, without prejudice to its position that the amendment is insufficient as a matter of law by reason of the decision and order of Ryan, J. dated October 1, 1968.)

(e) The answer of additional defendant Aetna in action "The Board of Education Central School District No. 2 of the Towns of Bedford, New Castle, North Castle and Pound Ridge vs. Aetna Casualty & Surety Co.," 68 Civ. 1162 be deemed a reply to the counterclaims of the defendant, Board.

(f) The answer of additional defendant Aetna is amended to include the additional Fifth affirmative defense, set-off and First counterclaim:

"32. Defendant (Aetna) repeats, reiterates and realleges each and every
allegation contained in paragraphs marked
"9", "10", "11", "12", "13", "14", "15",
"16", "18", "19", "20", "21", "22", "26",
"27", "28", "29", and "30".

33. That defendant Aetna, as surety with Fabrizio and Martin, Incorporated, as principal, made, executed and delivered to the Board of Education a labor and material payment bond dated March 17, 1964 and defendant Aetna incorporates said bond and all documents referred to therein with the same force and effect as though fully set forth at length herein and for the exact terms and conditions of said bond defendant, Aetna, tegs leave to refer to the same at the trial of this action.

34. That Judge Sylvester J. Ryan's decision as set forth in paragraphs "18", "19", "20", and "21" of this answer in addition

held that because of said illegality Fabrizio could not recover contract balances under the contract or on quantum meruit.

- 35. That subsequent to the time of the alleged default as set forth in paragraph "6" of this answer, defendant, Aetna received claims against said labor and material payment bond from laborers, materialmen and suppliers and thereafter defendant, Aetna, paid valid claims against said bond in the sum of \$114,396.86.
- 36. That in addition thereto, defendant has suffered additional losses and expenses in the sum of \$55,503.39.
- 37. That plaintiff, Board of Education, withheld and concealed material facts from defendant, Aetna, which materially altered the obligation which defendant, Aetna, assumed and rendered the contract illegal and void.
- 38. That the defendant, Aetna, would not have written said labor and material payment bond had it known these material facts.
- 39. That the withholding and concealment of these material facts was a fraud upon defendant, Aetna.
- 40. That the claims paid and losses and expenses suffered by defendant, Aetna, were the result of said fraud.
- 41. That by reason thereof, defendant, Aetna, was damaged in the sum of \$169,900.25."
- (g) The answer of additional defendant, Aetna, incorporates the affirmative defenses and set-offs of plaintiff, Fabrizio, in its reply to the counterclaims of defendant, Board of Education.
- 3(a) The parties suipulate that the following facts are not in dispute in this action (each party

reserving the right to object to the materiality of any such stipulated fact and its relevancy to the issues):

- (1) That at the times mentioned in the pleadings the plaintiff Fabrizio & Martin, Incorporated, was a foreign corporation organized and existing under and by virtue of the laws of the State of Connecticut, with its principal office for the transaction of business at Darien, Connecticut.
- (2) At the times mentioned in the pleadings, the defendant, Board of Education, Central School District No. 2 of the Towns of Bedford, New Castle and Pound Ridge, is a municipal corporation organized and existing under and by virtue of the laws of the State of New York, with its principal office in the County of Westchester, State of New York.
- (3) At the times mentioned in the pleadings the defendants, Mars Associates, Inc. and Normel Construction Corp. of New Rochelle, were domestic corporations and doing business as a joint venture with its principal office in the County of Westchester, State of New York.
- (4) At the times mentioned in the pleadings, additional party defendant, Aetna Casualty and Surety o., was and still is a corporation duly organized and existing under the laws of the State of Connecticut, with its principal place of business at 111 Pearl Street, Hartford, Connecticut.

(5) Judge Edward C. McLean in a memorandum decision and order dated and filed July 6, 1967, found the facts to be as follows:

* * *

"Upon the evidence adduced at the hearing, I find the facts to be as follows:

- (6) In November 1963, the Board of Education published a notice inviting bids for the construction of the school. Bidding documents, including plans and specifications of the school, were made available to bidders. Bids were to be submitted by December 19, 1963, but this date was extended to January 7, 1964.
- (7) There were six bidders for the contract for general construction and site work. Of these, the three lowest were the following:

Contractor	Base Bid
Rand Construction Co. Fabrizio & Martin, Inc. Walter A. Stanley	\$2,276,800 2,326,900
Construction Co.	2,549,000

- (8) In addition to the base bid, bids were also invited and received for certain additional work, described as "alternates." The only alternate of relevance here, Alternate No. 3, involved the construction of a running track and other athletic facilities.
- (9) On January 22, 1964, the Board, by a vote of three to two, adopted a resolution calling a meeting of the voters of the school district for February 20, 1964 to take action on the bids and upon the issuance of bonds to finance the project. The amount of the proposed bond issue for construction of the school was \$4,050,000*. (*Despite the fact that the main bond issue was recommended in

apparently fearing criticism on the ground of extravagance, announced that actually it would not spend more than \$3,800,000, and that it would not issue bonds for more than that amount.) In addition, a separate bond issue in the amount of \$95,000 was proposed for construction of the athletic facilities covered by Alternate No. 3. The Board at this meeting also adopted a resolution which "awarded" the general construction site work contract to Rand Construction Co., the low bidder, subject to the actionof the voters at their forthcoming meeting on February 20, 1964.

- (10) On February 5, 1964, Rand Construction Co. notified the Board that it withdrew its bid because it had discovered that it had made a mathematical error. After some consideration, the Board consented to this withdrawal. This left Fabrizio as the low bidder on the general construction and site work contract. But Fabrizio also claimed that he had made an error. he discovered his mistake before Rand made a similar discovery, for it was on January 9, 1964 that Fabrizio wrote to the Board stating that his base bid should have been \$2,498,000 instead of \$2,326,900, a difference of \$171,100. He asked permission to correct the error or to withdraw his bid.
- (11) Four members of the Board held a meeting with Fabrizio on February 10, 1964. The Board's attorney and a representative of the architect were present. A tape recording was made of this meeting with the knowledge of those present. The recording and a typed transcript of it were received in evidence. Several of the persons who were present testified at length as to what transpired.
- (12) It is clear beyond question, and I so find, that at this meeting Fabrizio satisfied the Board that he had in fact made a mathematical error of approximately \$171,000 in computing his bid and that thereafter the participants in the meeting attempted to find a way by which \$171,000 worth of work could be eliminated from the specifications so that Fabrizio could

afford to accept the contract at his original bid price of \$2,326,900 and still not lose any of the \$171,000. Various suggestions were made, but no agreement was reached, and at the end of a long meeting, it was left that Fabrizio would discuss the matter further with the architects.

- (13) It is also a fair inference that some of the Board members present had misgivings as to whether such a reduction of the contractor's obligation might not run afoul of statutory competitive bidding requirements. Early in the meeting, the chairman of the Board stated, according to the transcript:
- (14) 'See, we find ourselves up with the problem that under State law, if we would then take your change of figure here it would then violate the basis upon which we then could grant the contract, because this would mean a change in the overall figures. Now in order for us to be able to do this thing, it simply means that there would have to be a waiver of the \$171,000 and then there would have to be some way that we could find making this thing up somewhere along the line. Have you got any bright ideas?'

The architect said:

'But you are going to have to cut something, you can't save \$170,000 by sharpening a pencil. It has to be several major things and a lot of minor things to make it up.'

Subsequently, another member remarked:

'I mean, to be utterly blunt about it without saying anything I don't think this is something that would bear repeating - if we have to throw our hands up in the air and re-bid it, it's going to be a whole new party. It is a whole new party for you, if you want this job, as it is for everybody else. You are in a spot where you can see the end of the tunnel because you are the nearest to it. And I think in your mind's eye you have got to go back and look at those contingencies from the point of view of what can you do to get it with the here and now without trying to get into the wrestling match with the public again.'

Finally, a Board member inquired of the Board's attorney:

'Is this reasonable to do, counsel without prejudice? We don't expose ourselves to slings and arrows from the other bidders?'

To this counsel replied:

'No. No exposure.'

The architect thereupon inquired:

'What would you propose to do then? Enter into the contract without any of this on paper.'

To this query, one Board member said, "Oh, no," while another Board member said, "you have got to."

Counsel thereupon stated:

'Well, we've got to see what it is. If you see there are changes throughout the job, you can sign the contract and immediately sign change orders.'

With respect to this advice, one Board member commented that it was "like passing checks around."

Fabrizio said:

'I would be willing to cooperate as much as you people would like me to.'

- (15) On February 20, 1964 the voters authorized the construction of the school and athletic facilities and approved the bond issues in the full amounts of \$4,050,000 and \$95,000 respectively. On the same day the Board unanimously adopted a resolution which "awarded" the contract for general construction and site work to Fabrizio "at the bid rigures."
- (16) Meanwhile, Fabrizio conferred with the architect in an effort to find ways and means of eliminating \$171,000 worth of work from the contract. On February 12, the Clerk of the Board made a memorandum of a telephone conversation between the chairman

and the architect "in which it was determined that through certain changes in the contractors procedures as well as removal of certain items from the base plans the Fabrizio and Martin bid could come within the \$3,800,000 budget figure."

- (17) On February 13, the architect wrote to the chairman suggesting specific ways in which the saving could be accomplished.
- (18) On February 18, Fabrizio wrote to the Board stating that if Fabrizio & Martin, Inc. were awarded the general construction and site work contract "at our bid figures," it intended to withdraw its letter of January 9, 1964 in which it had requested permission to withdraw its bid.
- (19) On March 10, 1964, the architect wrote to the Board's attorney specifying the items that could be eliminated or changed and setting forth the dolloar amount by which each deletion or change would reduce Fabrizio's cost. After allowing for a slight increase in the cost of one item, the net saving to Fabrizio came to \$1,677 more than the \$171,000 error.
- (20) On March 17, 1964, Fabrizio and the Board signed a formal construction contract in which Fabrizio undertook to perform all the work "shown on the Drawings and described in the Specifications entitled Middle School, Bedford, New York (Drawings & Specifications dated November 7, 1963)" for \$2,326,900 for the basic work, and \$99,000 for Alternate No. 3. The "Drawings & Specifications dated November 7, 1963" were the original drawings and specifications upon which all the contractors had originally been asked to bid. The prices for the basic work and for Alternate No. 3 set forth in this contract were the exact sums specified by Fabrizio & Martin, Inc. in its original bid submitted on January 7, 1964.
- (21) Simultaneously with the signing of this contract, Fabrizio and the Board signed another document entitled "Change Order." At the hearing, the Board's attorney testified that it was prepared by the attorneys, on the basis, however, of data furnished by the

140a

architect. Whoever prepared it, certain features of it are of interest.

- (22) The document began by stating that "The modifications listed herein change our agreement executed this 17th day of March, 1964," i.e., the formal construction contract which the parties had signed a moment or two before. It then listed certain items to be deleted, i.e., rip-rap, an elevator, three dumb waiters and some snow fencing. It deleted brick paving, although it provided for a "better finish" on the concrete slabs on which the paving was to have been placed. it provided for the omission of the lower play field and the archery area as shown on the original plans, and for the substitution of two other play fields which were to be used as a source of fill for the construction work, a so-called "borrow area." These were to be left "rough-graded," without top soil or seeding, all as shown by new plans annexed to this document.
- (23) Finally, the change order provided for a change in the location of the athletic track (Alternate No. 3) in accordance with a new drawing annexed to the change order. The document concluded with this obscure sentence:
- 'Contractor shall include in this Alternate No. 3 a cash allowance of \$1,677 in the agreed upon price.'
- (24) No dollar figures were set against any of these items. The evidence shows, however, beyond question, and I so find, that the items contained in this change order were substantially those which the architect had recommended for change or elimination in his letter to the attorney of March 10, 1964.*
- (25) (*The former clerk of the Board testified that on March 17, 1964 the assistant superintendent of schools instructed him to see to it that copies of this letter of March 10, 1964 were removed from the files of the school district.)
- (26) The net result of these changes and omissions was to reduce Fabrizio's cost by \$172,677. This was precisely \$1,677 more than the \$171,000 which the Board had agreed to

save him. Thus, the sentence quoted above means that Fabrizio would repay this excess to the Board by giving the Board "a cash allowance" of \$1,677.

- (27) The original plans and specifications dated November 7, 1963, upon the basis of which the contractors filed their original bids, were approved by the State Education Department. The new drawings attached to the change order of March 17, which changed these plans in certain respects, were not submitted to the State Education Department for approval before June 1967. The testimony does not clearly establish that they were submitted even then.
- (28) The Board did not request other contractors to bid upon the work as modified by the change order of March 17, 1964, nor, as far as appears, were other contractors ever advised that the plans and specifications had been changed in these respects.
- On February 24, 1964, several weeks before the execution of these documents, the Superintendent of Schools wrote to the chairman of the Board pointing out that "any deviation from the original contract by way of change orders must have the approval of the State Education Department." The change order signed on March 17, 1964 was not submitted to the State Education Department or approved by it until June 1967, over three years later and long after this litigation had been begun and the legality of these proceedings had been challenged. By letter dated June 23, 1967, just three days before the beginning of the hearing on this motion, the State Education Department approved the change order, stating that "it does not violate any of our past or present standards." The evidence does not disclose what the Board told the State Education Department in late June 1967 concerning the circumstances under which this change order was executed.
- (30) Change order were signed by three other contractors on this job on March 17. 1964. In each case the dollar amount of the change was specifically stated. The amounts were \$26,000, \$1,300 and \$925 respectively. These amounts were deducted from the contract price.

Each of these change orders was approved by the State Education Department on October 26, 1964.

- (31) On March 25, 1964, the Board unanimously adopted a resolution which ratified the execution of the "contracts and change orders," without comment.
- (32) Various other change orders were issued to all the contractors from time to time as their respective work progressed. Each of these change orders was approved by the State Education Department. The time lag between the performance of the work covered by the change order and the approval of the change order did not exceed twelve months in any case.
- (33) With respect to the athletic track (Alternate No. 3), the evidence establishes the following facts. On February 20, 1964, the voters of the District authorized the expenditure of \$95,000 on these facilities. The formal contract signed by the Board and Fabrizio on March 17, 1964 set forth a price for them of \$99,000. The change order signed simultaneously therewith modified Alternate No. 3 in accordance with a new drawing. Although the change order was silent as to the effect of this change in dollars, actually the change increased Fabrizio's cost for this particular work, although by virtue of the change, the Board was able to save money on blasting, which it would otherwise have been required to do. This saving was of no concern to Fabrizio, since the blasting was not of have been done at his expense in any case.
- (34) On March 19, 1964, the Board's attorney advised the Superintendent of Schools that although Fabrizio's contract provided for \$99,000 for Alternate No. 3, "Mr. Fabrizio has agreed orally with Mr. Van Allsburg (chairman of the Board) that the cerificates covering this work will not exceed \$95,000 but that this will not affect the total contract price."
- (35) Fabrizio submitted request to the loard for part payment from time to time as the work progressed. These requests consistently showed \$99,000 as the contract price of

Alternate No. 3 until February 1966. The Board's attorney then told Fabrizio that he must take \$4,000 off the \$99,000 and put it on another item. Fabrizio had already been paid \$98,000 for this work on Alternate No. 3 by that time."

* * *

- (36) This Court found the contract awarded to plaintiff was not awarded in compliance with Section 103(1) of the General Municipal Law and therefore the contract was void. (Memorandum decision and order entered thereon, dated July 6, 1967).
- (37) Additional defendant Aetna issued its performance and payment bonds dated March 17, 1964, wherein plaintiff was principal and defendant Board was obligee, in customary form.
- (38) Plaintiff performed certain work pursuant to the terms and provisions of its contract and received more than 90% of the contract price in the sum of \$ as called for by the contract documents.
- (39) Pursuant to approved change orders plaintiff also received certain payments for extra work performed in the sum of \$
- (40) On or about March 16, 1966 the defendant Board terminated further performance of work by plaintiff.
- (41) After commencement of the action but prior to the defendants filing their answer, certain voters of the School Board District moved to intervene to have the contract between plaintiff and defendant Board declared null

and void for failure to comply with the provisions of Section 103 of the General Municipal Laws of the State of New York.

- (42) The basis of plaintiff's complaint against defendant Board was that defendant Board improperly terminated the contract of plaintiff.
- (43) The complaint originally filed by the plaintiff contained six causes of action:
- (a) By the first cause of action plaintiff sought to recover damages in the sum of \$309,219.28 for breach of the written contract that it entered into with the Board dated March 17, 1964.
- (b) By the second cause of action plaintiff sought to recover \$182,482.85 for extra and additional work, labor and services performed and materials furnished to and at the request of the Board.
- (c) By the third cause of action plaintiff sought to recover the sum of \$150,000.00 for delays and other acts and omissions of defendant Board.
- (d) By the fourth cause of action plaintiff sought to recover damages in the sum of \$22,000.00 for the unlawful termination of its work by defendant Board.
- (e) By the fifth cause of action plaintiff sought to recover damages in the sum of \$66,904.02 for the wrongful retention by defendant Board and defendant Maxs-Normel of materials, tools and appliances of plaintiff.

- (f) By the sixth cause of action plaintiff sought to recover damages in the sum of \$641,622.13 as the reasonable value of the work, labor and services performed and materials furnished by plaintiff to defendant Board for which it had not been paid.
- (44) Defendant Board interposed an answer containing among other things, two counterclaims:
- (a) By the second counterclaim defendant
 Board seeks recovery in the sum of \$410,000.00 (amended by
 this Order to \$496,890.00), contending that this is the
 damage sustained by defendant Board to complete the
 Bedford Middle School subsequent to the term. Ition of the
 plaintiff.
- (b) By the first counterclaim defendant Board seeks recovery in the sum of \$2,131,859.00, which is the full amount paid by it to the plaintiff prior to its termination of the plaintiff.
- (45) Subsequent to interposing its answer, defendant Board moved for summary judgment dismissing all causes of action contained in the plaintiff's complaint and also sought summary judgment on its two counterclaims.
- (46) This Court (Ryan, J.) by an order and decision dated October 1, 1968, dismissed all of the causes of action contained in plaintiff's complaint but denied summary judgment to the Board on its two counterclaims.
- (47) Judge Ryan held as a matter of law that insofar as the Fifth counterclaim (of the defendant Board)

seeks damages flowing from breach of the prime contract and supplemental agreement by plaintiff, it cannot stand. (Opinion, Ryan, J., October 1, 1968, 290 F. Supp. 945 (1968))

- (48) Plaintiff appealed the order of this Court (Ryan, J.) dated October 1, 1968.
- (49) The United States Circuit Court for the Second Circuit dismissed the appeal solely on the ground the order of October 1, 1968 was not appealable.
- (50) Subsequent to Judge McLean's decision of July 6, 1967, defendant Board commenced an action against additional defendant Aetna, in the Supreme Court, County of Westchester, by service of a summons without complaint seeking to recover from defendant Aetna the sum of \$520,000.00 as the excess cost of completuon of the terminated underlying contract. Thereafter, the action was removed to this Court on March 21, 1968 by verified petition and removal bond.
- (51) After Judge Ryan's décision of October 1, 1968, granting defendant Board its motion for summary judgment dismissing the complaint of plaintiff and denying defendant Board's motion for summary judgment on its two counterclaims, and on or about March, 1969, defendant Board served its complaint on additional defendant Aetna.
- (52) Defendant Board, for its complaint against additional defendant Aetna, pleads the contract between it and plaintiff Fabrizio, the performance bond furnished by additional defendant Aetna, in behalf of the plaintiff Fabrizio, as principal, and delivered to defendant Boand as

obligee. Defendant Board further alleges the performance bond as guaranteeing the performance of the contract and annexes a copy of the bond as an exhibit, and further pleads the supplemental agreement of March 23, 1965. Defendant Board also alleged that it called upon additional defendant Aetna, to perform under the performance bond in accordance with the contract and supplemental agreement.

- (53) The damages defendant Board seeks against additional defendant Aetna are delay damages, excess costs to complete and liquidated damages as set forth in the supplemental agreement.
- (54) The answer of additional defendant Aetna, besides denying the material allegations of the complaint, pleads four affirmative defenses as follows:
- (a) The decision and order of Judge McLean rendered on July 6, 1967 holding that the contract was illegal and void by reason of non-compliance with Section 103(1) of the General Municipal Law is res judicata that the contract which forms the basis of defendant Board's claim is illegal and void and that by reason thereof, the bond is void and of no effect.
- (b) That Judge Ryan's decision of October 1, 1968, confirming Judge McLean's holding declaring the contract illegal and void and declaring the supplemental agreement entered into on March 23, 1965 illegal and void is res judicata that that supplemental agreement forming the basis of defendant Board's claim is interest and void

and that by reason thereof, the bond, as modified, is void and of no effect.

- (c) Additional defendant Aetna further pleads the decisions of Judge Ryan and Judge McLean holding the contract illegal and void and the supplemental agreement illegal and void as the basis for voiding the bond for want of consideration.
- (d) Additional defendant Aetna, pleads as a fourth affirmative defense that the bond executed by it was furnished to the defendant Board without knowledge that the contract between plaintiff and defendant Board was illegal and void and without knowledge of the events preceding the award of the contract to the plaintiff by defendant Board and that additional defendant Aetna, did not intend to nor would they have guaranteed performance of an illegal contract; that additional defendant Aetna was induced to furnish its bond under fraudulent conditions and would not have done so had it known the facts rendering the contract illegal and void and that by reason thereof, defendant Board is estopped from maintaining this action upon the bond furnished pursuant to the illegal and void contract.
- (55) Thereafter, and on or about January 16,
 1970 additional defendant Aetna moved pursuant to Rule 56
 of the Federal Rules of Civil Procedure for summary judgment dismissing defendant Board's action against additional
 defendant Aetna. Defendant Board cross-moved against

Aetna for judgment granting the relief sought in its complaint.

٨,

- (56) On May 11, 1970, Judge Inzer B. Wyatt rendered a decision granting additional defendant Aetna's motion for summary judgment and denying defendant Board's cross-motion and a judgment was thereafter entered on May 12, 1970 dismissing defendant Board's complaint against additional defendant Aetna.
- (57) Notice of Appeal was filed by defendant
 Board on June 3, 1970 to the United States Court of Appeals
 for the Second Circuit, and the appeal was argued on
 September 15, 1971 and decided on December 15, 1971.
- the action was to be remanded to the District Court with instructions to consolidate it with the pending Fabrizio-Board action, and making Aetna an additional party with respect to the Board's counterclaim against Fabrizio so that all the facts bearing upon the rights of the parties may be adduced at the said trial to establish the nature or extent of the damages, if any, recoverable by the Board against Aetna and the development of the facts relating to the underlying equities vis-a-vis the Board and Aetna as a direct consequence of the illegal contract.
- (59) An order was entered on February 9, 1972, in conformity with the Court of Appeals decision.

- (1) Plaintiff not only contends that the Board has sustained no damages, but also contends that the Board has obtained value in excess of the amount paid to the plaintiff. The basis for this contention is that the Board not only retained the sum of \$309,219.28 which was the value of work admittedly performed by the plaintiff but also refused to make payment to the plaintiff of the sum of \$182,402.85, which represents the value of extra work plaintiff was directed to perform for the Board but for which it did not receive payment. The architect for the Board has admitted the Board's liability for certain of this work, but has questioned only the value of the work as claimed by the plaintiff. Plaintiff further contends that the Board obtained additional value in that it retained materials, equipment and supplies of the plaintiff after the termination and also delayed plaintiff in the performance of its work beyond the reasonable time that it would have taken plaintiff to perform but for the acts and omissions of the Board. The value of all of these items must be considered in determining the total value of what the Board received from plaintiff and as to whether the Board sustained any damages.
- (2) Plaintiff further contends that the alleged completion costs claimed by the Board are not allowable costs and are excessive and not substantiated by the facts.

- (3) Plaintiff also contends that the Board is not entitled to the return of any of the monies it paid to the plaintiff.
- 3(c). It is the contention of the defendant Board of Education that:
- (1) Its damages for plaintiff's failure to complete the project is \$496,890, which it is entitled to recover from the plaintiff.
- (2) It is also entitled to recover from plaintiff the total amount paid by it to the plaintiff of \$2,131,859.
- (3) Plaintiff is not entitled to any setoff to the damages claimed by the defendant Board of Education and reserves its right to object to the amendment of the Reply as provided in paragraph 1(b) hereof.

Attached marked Exhibit "1" are proposed contentions and issues of the defendant Board which, however, are objected to by plaintiff and additional defendant Aetna.

- 3(d). Additional defendant Aetna's contentions are:
- (1) Additional defendant Aetna at no time participated in the negotiations leading to modification of the plans and specifications resulting in the reduction of required work of the value of \$1.71,000 without reduction in contract price.
- (2) Additional defendant Aetna had no knowledge concerning the agreement to modify and the actual modification of plans and specification to reduce the value of
 the work to be done without reduction of the contract price.

^{*}Attached marked Exhibit "2" are proposed additions of plaintiff to pre-trial order which are objected to by defendant Board.

- 3(c). Additional contention of defendant Board:
- (4) Change Order 1 was already physically attached to and made a part of the contract between plaintiff and defendant Board at the time that additional defendant Aetna issued its performance and payment bonds dated March 17, 1964.

- (3) Additional defendant Aetna issued the performance and payment bonds herein in usual course upon the assumption the plaintiff's bid was accepted as made and without agreement to modify or without modification of the plans and specifications so as to reduce the cost of performance without reduction in price.
- (4) Additional defendant Aetna issued the performance and payment bonds herein upon the belief that the contract entered into was a legal agreement.
- (5) Prior to and at the time of the issuance by additional defendant, Aetna, of its bonds, it was
 not advised of the said illegal arrangements between
 plaintiff and defendant Board, and defendant Board withheld
 these material facts from additional defendant, Aetna.
- (6) The defendant Board, knew that these facts were material.
- (7) Additional defendant, Aetna, had no knowledge of said illegal arrangements during the entire course of performance by plaintiff of said illegal contract and first obtained knowledge thereof during the course of this litigation.
- (8) These material facts, i.e., the change order which rendered the contract illegal, materially altered the obligations which additional defendant Aetna assumed, and therefore, the Aetna as surety is discharged and the defendant Board is estopped from claiming against the additional defendant Aetna.

1548

- (9) The withholding of material facts was a fraud upon additional defendant Aetna, as surety, and therefore additional defendant Aetna, is entitled to recover back its losses paid under the payment bond and the other expenses and charges incurred which were the direct result of the fraud, and in the event it should be determined that additional defendant Aetna, is required to respond in damages to defendant Board, said losses, costs and expenses should be credited against any recovery.
- (10) The defendant Board cannot recover against additional defendant Aetna, on an illegal and void contract which the defendant Board, participated in making illegal and void and in which transaction additional defendant Aetna in no way participated.
- (11) The defendant Board's action against the additional defendant Aetna, is based on the illegal contract and supplemental agreement and seeks recovery for damages flowing from breach of both the prime contract and supplemental agreement and said action cannot be maintained as a matter of law since the Board cannot plead and prove an illegal contract. Fabrizio and Martin, Inc. v. Board of Education et al, 290 F. Supp. 945, 956.
- (12) The defendant Board, in the fourth defense and counterclaim additionally seeks to recoup payments made to plaintiff during the course of the performance of the illegal contract. There has been no receipt by additional defendant Aetna, of anything from the defendant

155a

Board, and thus the Board is entitled to no recovery as against additional defendant Aetna, nor can anything be returned by additional defendant Aetna, to defendant Board.

- (13) The defendant Board, cannot maintain the instant action against the additional defendant, Aetna, because the basis of the damages are illegally relet contracts for completion which in turn were in violation of New York General Municipal Law § 103.
- damages by reason of the illegality because there was no lower responsible bidder, but instead a higher bidder, whose bid was in excess of the plaintiff Fabrizio's bid by \$223,000.00 and assuming arguendo that \$171,000.00 was added to the Fabrizio bid, it would have still cost the Board more to have the work done by another contractor. By reason thereof, the Board suffered no loss as a result of the illegality. Additional defendant Aetna contends this is further evidenced by the fact that the cost to complete by the defendant Mars Normel, was within the original contract balance.
- (15) The Ciccuit Court of Appeals in reversing the District Court's dismissal of the action as against additional defendant Aetna, remanded the case to determine "the damages which the Board suffered as a direct consequence of the illegal contract."

The Circuit Court further held that the nature and extent of the damages, if any, recoverable

by defendant Board, against defendant Aetna could only be determined "after a full development of the facts relating to the underlying equities, vis-a-vis the Board and Aetna."

Additional defendant Aetna contends that in equity where plaintiff and defendant Board, conspired without notice to additional defendant Aetna, of the underlying facts constituting the illegality, that under the circumstances and principles of equity, the Court would not impose a loss on the additional defendant Surety for failure to perform an illegal contract or for the loss sustained by the Board as a result of entering into an illegal contract within the guidelines of Gerzoff.

- (16) The damages of the defendant Board seeks to recover are not a direct consequence of the illegal contract and therefore are not recoverable against additional defendant, Aetna.
- (17) On the undisputed facts as found by Judge McLean, plaintiff Fabrizio, satisfied defendant Board, that he had made a mathematical error of approximately \$171,000 in computing his bid. Defendant Aetna, contends that by reason thereof, plaintiff would have been entitled as a matter of law and defendant Board, would have been required to permit plaintiff to withdraw its bid and had the plaintiff withdrawn its bid and the illegal contract not have been entered into, the defendant Board would have had no other alternative than to enter into a contract with the 3rd lowest bidder, Walter A. Stanley Construction Co. For

157a

its base bid price of \$2,549,000 or \$223,000 in excess of the contract amount entered into between plaintiff and the Board. That by reason thereof, the Board suffered no damage as a direct consequence of the illegal contract but in fact effected substantial savings.

- (18) Additional defendant Aetna contends that the Board may not recover damages as for a breach of contract; that the damages which the Board seeks to recover are such as flow from a breach of contract.
- 4(a). The exhibits which each party now expects to offer at the trial are those identified in the memoranda heretofore filed pursuant to local Calendar Rule 13(b)

 III (g). Should either party hereafter decide to offer additional exhibits, prompt notice of that fact shall be given to the other party and to the Court by serving and filing a supplemental pre-trial memorandum. The supplemental pre-trial memorandum may be in a short form statement filed with the deputy clerk for calendars unless served at trial, when it is to be filed with the trial judge. It shall set forth the reason why the exhibit was not theretofore identified. No exhibit may be offered at trial unless identified in a pre-trial memorandum.
- (b) Additional defendant Aetna, by reason of the recent decision of the United States Circuit Court of Appeals for the Second Circuit and order entered thereon, has rot yet filed a memorandum pursuant to local calendar Rule 13 (b) III (g) of the local calendar rules. Additional

defendant Aetna, will file its memorandum in sufficient time so as to give ample notice to the other parties as to the exhibits additional defendant Aetna will offer into evidence. The memorandum will additionally state the witnesses which the additional defendant Aetna intends to call.

- 5. The parties agree that the witnesses whom each party now intends to call, along with the specialty of experts to be called, are those listed in the memorandum heretofore filed and to be filed by additional defendant, Aetna, pursuant to local Calendar Rule 13(b) III (h). Should any party hereafter decide to call any additional witnesses, prompt notice of their identity shall be given to each other party and to the Court by serving and filing a supplemental pre-trial memorandum. The supplemental pre-trial memorandum may be in a short form statement filed with the deputy clerk for calendars unless served at trial, when it is to be filed with the trial judge. It shall set forth the reason why the witness was not theretofore identified. No witness may be called at trial unless identified in a pre-trial memorandum.
- 6. The parties agree to limit the number of expert witnesses as follows:

Other than the witnesses listed in the parties' pre-trial memoranda, they do not intend to call any expert witnesses.

159a

- 7. Plaintiff's and derendant's claims for damages in this action, as of the date of this conference, are the same as those set forth in the memorandum heretofore filed pursuant to local Calendar Rule 13(h).
- (a) The damages of additional defendant, Aetna, are the same as alleged in the Fifth affirmative defense and set-off and First counterclaim of the amended answer as set forth in this pre-trial order. Should the damages sustained by additional defendant Aetna, change, prompt notification will be given to each party and to the Court by serving and filing a supplemental pre-trial memorandum and/or a schedule with the trial judge.
- 8. The parties also agree on the following matters:
- (a) Plaintiff at this time expects to require 5 or 8 trial days; defendant at this time expects to require 10 trial days; additional defendant Aetna, at this time expects to require 2 to 3 trial days.
- 9(a) The issues to be tried (with the consent and agreement of the parties) are as follows:
- (1) What damages, if any, did the defendant Board sustain as a direct consequence of the illegal contract?
- (2) Is the defendant Board entitled to retain the benefit of plaintiff's performance and also have returned to it all sums previously paid by it to the plaintiff?

- 9(b) Plaintiff also contends the following are issues to be tried:
- (1) Did the defendant Board of Education act properly in terminating the contract of the plaintiff?
- (2) What is the value of the work performed by the plaintiff?
- (3) Did the defendant Board of Education receive value in excess of what it has paid to the plaintiff?
- (4) To what extent did the value of the work performed by the plaintiff exceed the amount actually paid to the plaintiff by the defendant Board of Education?
- (5) What was the value of the work remaining to be performed at the time plaintiff's performance was terminated by the defendant Board of Education?
- 9(c) Additional defendant Aetna contends the following are issues to be tried:
- (1) Did additional defendant Aetna have knowledge that the change order issued at the time of execution or award of the contract resulted in a saving in cost of \$171,000 without reduction in price?
- (2) Did additional defendant Aetna receive anything from defendant Board?
- (3) Did defendant Board withhold material facts from additional defendant Aetna?
- (4) Did defendant Board have a duty to disclose to additional defendant Aetna the facts renderin; the contract illegal and void?

- (5) Assuming arguendo that the answer to
- (4) is affirmative, did the failure to disclose the facts rendering the contract illegal and void, constitute a fraud on additional defendant Aetna?
- (6) Assuming arguendo that the answer to (5) is in the affirmative, is defendant Board liable to additional defendant Aetna for damages incurred as the result of issuing its bonds?
- (7) Did additional defendant Aetna's bond guarantee the performance of an illegal contract?
- (8) Can defendant Board recover against additional defendant Aetna for damages allegedly sustained as the result of entering into an illegal contract where defendant Board participated directly in the illegality?
- (9) Can defendant Board plead and prove an illegal contract as the basis of recovery against additional defendant Aetna?
- (10) Was the contract for completion of the work and upon which defendant Board relies as the basis for recovery of damages against additional defendant Aetna, illegally relet?
- (11) Assuming arguendo that the answer to (10) is in the affirmative, can defendant Board recover against additional defendant Aetna for these damages?
- (12) Under the guidelines established by the Gerzoff case, and the facts of the instant case, has the defendant Board suffered any damages as the consequence of the illegal contract for which additional defendant

Aetna should be made to respond?

(13) Did defendant Board effect substantial savings when it entered into the illegal contract with plaintiff on the basis that the next lowest bid was \$223,000.00 in excess of plaintiff's bid?

(14) Are there any equities vis-a-vis the Board and additional defendant Aetna which would justify imposing damages against Aetna in favor of the Board?

April , 1972.

SO ORDERED,

U. S. D. J.

CONSENTED TO:

Attorney for Plaintiff

Attorney for Defendants

Attorney for Additional Defendant, Aetna

AMENDMENT TO PRE-TRIAL ORDER ANNEXED TO FOREGOING

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

-X

:

FABRIZIO & MARTIN, INCORPORATED,

Plaintiff.

Index No.

66 Civ. 2935

-against-

THE BOARD OF EDUCATION CENTRAL SCHOOL DISTRICT NO. 2 OF THE TOWNS OF BEDFORD NEW CASTLE, NORTH CASTLE and POUND RIDGE, MARS ASSOCIATES, INC. and NORMEL CONSTRUCTION CORP. of NEW ROCHELLE, a joint venture.

AMENDMENT TO PRE-TRIAL ORDER

Defendants.

-and-

AETNA CASUALTY AND SURETY CO.,

Additional Defendant on the Counterclaim of Defendant The Board of Education.

-X

Additions and modifications to pre-trial order attached hereto and as accepted and agreed to by the parties.

1. Page 4: add following paragraph 41 before (g)

(Defendant Board agrees to the amendment, without prejudice to its position that the amendment is insufficient as a matter of law by reason of the decision and order of McLean, J., dated July 6, 1967, the decision and order of Ryan, J., dated October 1, 1968, and the decision of the Circuit Court of Appeals, dated December 15, 1971, and its order dated February 9, 1972. Defendant Board

further replies to said amendment that it lacks knowledge on information sufficient to form a belief as to the truth of any of the allegations contained in paragraphs 35, 36 and 38 of said amendment, and specifically denies paragraphs 37, 39, 40 and 41 thereof.)

2. Page 4: add following paragraph (g)

(Defendant Board agrees to the amendment, without prejudice to its position that the amendment is insufficient as a matter of law by reason of the prior decisions and orders in this case.)

3. Page 14: add new paragraph 37(a)

37(a) In its first requisition dated April 29, 1964, plaintiff billed defendant Board for premiums of \$25,000.00 for a "bond", and \$18,000.00 for "subcontractor's bond". These premiums were paid to plaintiff by defendant Board on May 13, 1964.

4. Page 20: add new paragraph (58a)

(58a) Inter alia the Court of Appeals

stated:

"Still open for decision is Fabrizio's liability to the Board. It was to cover any such potential liability that the Board required and Fabrizio sought and paid for Aetna's monetary guarantee of prompt and faithful performance."

"In other words, until a judgment, if any, is rendered for damages, if any, against Fabrizio and in favor of the Board, there is no way of determining whether the condition of the surety bond has been met."

B

* * * * *

"Had the invalidity of the contract prevented the Board from obtaining any recovery for damages against Fabrizio, Aetna's contention might have greater merit."

* * * * *

"Judge Ryan, relying on Gerzof, directed a trial in the Fabrizio-Board action for the determination of the "the damages which the Board suffered as a direct consequence of the illegal contract." (Fabrizio, supra, 290 F. Supp. at 956). Although this decision removes Aetna's premise of no liability under a void contract, it does not establish the nature or extent of the damages, if any, recoverable by the Board against Aetna. Such a determination can only be made after full development of the facts relating to the underlying equities, vis-avis the Board and Aetna."

5. Page 22: additions to paragraph 3(c)

Following the word "plaintiff" in subparagraphs
(1) and (3), add the phrase "and additional defendant Aetna".

6. Page 32: add a new paragraph 9(d).

- 9(d) Defendant Board contends the following are Essues to be tried:
- (1) what damages, if any, did the defendant Board sustain in completing plaintiff's work after it

June , 1972

SO ORDERED,

U. S. D. J.

Consented to:

Attorney for Plaintiff

Lant Vanne Attorney for Defendants

11.1. M. 1. 1. 14. Attorneys for Additional

Defendant, Aetna

EXHIBIT "1" - PROPOSED CONTENTIONS AND ISSUES ANNEXED TO UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

-X

FABRIZIO & MARTIN, INCORPORATED,

Index No. 66 Civ. 2935

Plaintiff,

-against-

THE BOARD OF EDUCATION CENTRAL SCHOOL:
DISTRICT NO. 2 OF THE TOWNS OF BEDFORD
NEW CASTLE, NORTH CASTLE and POUND:
RIDGE, MARS ASSOCIATES, INC. and
NORMEL CONSTRUCTION CORP. of NEW:
ROCHELLE, a joint venture,

PROPOSED CONTENT
TIONS AND TESUES
OF DEFENDANC
BOARD OBJECTED
TO BY PLAINTIFF
AND ADDITIONAL
DEFENDANT AETNA

Defendants,

-and-

AETNA CASUALTY AND SURETY CO.,

Additional Defendant on : the Counterclaim of Defendant The Board of Education

The Defendant Board proposes the following items 1 through 4 be added as its contentions to paragraph 3(c) (p. 22) of the pre-trial Order and items (5 through 11 be added as issues to be tried in paragraph 9(d) (p. 33). The plaintiff and the additional defendant Actna oppose and object to these proposed contentions and issues on the ground that they are totally irrelevant, immaterial, improperly framed and prejudicial to plaintiff and additional defendant Actna.

1. Judge McLean's decision also distinguished the motion before him -- to compel arbitration -- from the case which had been decided two months earlier by the Supremo Court, Prima Paint Corp. vs. Flood and Conklin Mfg. Co., 87 S. Ct. 1601, 388 U.S. 395, 18 L. Ed. 2d 1270, in visch the Supremo Court held "that the question of whether

a contract containing an arbitration clause was invalid because the contract was induced by fraud was to be determined by the arbitrators, not by the court."

2. Included in the delay damages sought by defendant Board are those, if any, that may result from actions brought by the three prime contractors against defendant Board in the Supreme Court, County of Westchester, in which defendant Board has brought in plaintiff and additional defendant Aetna as third party defendants. The total damages claimed by these other prime contractors is \$139,654.36. This action is entitled:

"SUPREME COURT OF THE STATE OF NEW YORK COUNTY OF WESTCHESTER

MANDELL & CORSINI, INC., etc.,

Plaintiff No. 1

-and-

FRANK & LINDY PLUMEING AND HEATING CONTRACTORS, INC., etc.,

Plaintiff No. 2

-and-

HAMMOND ELECTRIC CO., INC., etc.,

Plaintiff No. 3

-against-

THE BOARD OF EDUCATION CENTRAL SCHOOL DISTRICT NO. 2 of the towns of BEDFORD, NEW CASTLE, NORTH CASTLE and POUND RIDGE,

Defendant.

-X

THE BOARD OF EDUCATION CENTRAL SCHOOL DISTRICT NO. 2 of the towns of BEDFORD, NEW CASTLE, NORTH CASTLE and POUND RIDGE,

Third-Party Plaintiff,

-against -

THE AETNA CASUALTY & SURETY COMPANY and FABRIZIO & MARTIN, INCORPORATED,

Third-Party Defendants.

The damages sought by the three plaintiffs in the said state action are those allegedly resulting from delays caused by the plaintiff herein, for which the plaintiffs in the state action seek to hold defendant Board responsible on the ground that plaintiff herein was either defendant Board's agent in dealing with the other prime contractors or that defendant Board failed to exercise proper control and supervision over plaintiff herein and to require it to coordinate its work with that of the other prime contractors.

- 3. If the state action by the other three prime contractors results in a judgment in favor of the plaintiffs therein against the defendant Board, any damages awarded to the plaintiffs therein shall be paid by plaintiff herein and additional defendant Aetna.
- 4. It is the responsibility of plaintiff herein and additional defendant Aetna to undertake the defense of the defendant Board in the said state action by the other three prime contractors, and to save the defendant Board

170a

harmless from damages, legal costs and other expenses in said action. The three plaintiffs in the said state action and the defendant Board having all expressed their willingness to remove said state action to the Federal Court and to consolidate it with the instant case, defendant Actna should be required -- prior to the trial of the instant action -- to consent t such removal and to join in application therefor. Defendant Board further claims that such removal to the District Court is in the interest of justice and that only such removal to the District Court will enable the complete application to the case of the equitable principles enunciated by the Circuit Court of Appeals.

- 5. What damages, if any, did the defendant Board sustain as a result of plaintiff's defaults and performance prior to the termination of its contract?
- 6. What defaults and performance causing damage to defendant Board did plaintiff commit prior to March 23, 1965, when plaintiff and the defendant Board entered into their Supplemental Agreement, which was agreed to and consented to by additional defendant Aetna?
- 7. Did additional defendant Aetna, before it executed the Supplemental Agreement, have full knowledge of plaintiffs' defaults and performance then alleged by defendant Board?
- 8. Under the Circuit Court of Appeals' decision, are plaintiff and additional defendant Aetha Hable

for damages suffered by defendant as a result of plaintiff's defaults and performance alleged in the Supplemental Agreement.

- 9. Does such damage include the claims made by other prime contractors for delays caused by plaintiff both before and after the execution of the Supplemental Agreement?
- 10. Should the measure of damages to defendant Board for the substantial delay in the construction of the school and its consequent unavailability to school children for more than a year, be the measure provided by the liquidated damages set forth in the Supplemental Agreement?
- Should the measure of such damage to defen-11. dant Board include its consequent loss of special financial aid contracted for with the Federal and State governments?

Respectfully submitted, Louis E. Yavner Attorney for Defendant Board

Dated: New York, New York June , 1972

EXHIBIT "2" - PROPOSED ADDITIONS ANNEXED TO FOREGOING PRE-TRIAL ORDER

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

FABRIZIO & MARTIN, INCORPORATED,

Plaintiff,

-against-

THE BOARD OF EDUCATION CENTRAL SCHOOL DISTRICT NO. 2 OF THE TOWNS OF BEDFORD, NEW CASTLE, NORTH CASTLE and POUND RIDGE, MARS ASSOCIATES, INC. and NORMEL CONSTRUCTION CORP. of NEW ROCHELLE, a joint venture.

Defendants,

-and-

AETNA CASUALTY AND SURETY CO.,

Additional Defendant on the Counterclaim of Defendant The Board of Education

The Plaintiff, Fabrizio & Martin, Inc. proposed the following additions to the Pre-Trial Order:

 Amend the complaint to include the following cause of action:

"AS AND FOR A SEVENTH
CAUSE OF ACTION AGAINST
DEFENDANT, BOARE OF
EDUCATION CENTRAL SCHOOL
DISTRICT NO. 2

THIRTY-SECOND: Plaintiff repeats and realleges each and every allegation stated and contained in paragraphs FIRST through FOURTH inclusive hereof with the same force and effect as though fully set forth herein.

THIRTY-THIRD: That in er about November, 1963 the Board published a notice inviting bids on the construction of the Bedford Middle School.

THIRTY-FOURTH: That the bids were opened on January 7, 1964, and with respect to the general construction and site work, Rand Construction Company was the apparent low bidder with a bid of \$2,276,800. and Fabrizio & Martin, Inc. was the apparent second lowest bidder with a bid of \$2,326,900.

THIRTY-FIFTH: That by letter dated January 9, 1964, Fabrizio advised the Board that it had made an error in its bid computations and requested permission to either withdraw its bid or adjust the error by increasing its bid price by the sum of \$171,000.

THIRTY-SIXTH: That the Board did not respond to the Fabrizio letter of January 9, 1964.

THIRTY-SEVENTH: That on or about February 5, 1964, Rand notified the Board that it had made an error in its bid and requested permission to withdraw it, which request was thereafter granted.

THIRTY-EIGHTH: That the Board thereafter entered into negotiations with Fabrizio and the third lowest bidder.

FOURTIETH: That the Board thereafter entered into negotiations with Fabrizio and the Board, including its agents, represented to Fabrizio that it was legal and proper to eliminate work from the original contract documents equivalent to the error that Fabrizio had made in its bid and to execute a change order simultaneously with the execution of the contract providing for the elimination of the work

FORTH-FIRST: That, on information and belief, such representations were false and fraudulent and negligently made.

FORTY-SECOND: That Fabrizio relied on the representations made by the Board and its agents.

FORTY-THIRD: That Fabrizio was not represented by counsel throughout its negotiations with the Board and its agents.

FORTY-FOURTH: That based on the representations of the Board and its agents, Fabrizio entered into a contract with the Board on March 17, 1964 and simultaneously executed a change order providing for the elimination of bork from the original contract documents having a value of approximately \$171,000.

FORTY-FIFTH: That the Board subsequently submitted the change order referred to supra to the State Education Department for approval, which approval was granted.

FORTY-SIXTH: That all acts required by statute to be performed in validating the change order werd

FORTY-SEVENTH: That by an Order and Decision dated July 6, 1967, Hon Edward C. McLean, U.S.J.J. found that the procedure followed by the Board in executing the change order simultaneously with the contract was not in compliance with Section 103(1) of the General Municipal Law of the State of New York, and was therefore void.

FORTY-EIGHTH: That by an Order and Decision dated October 1, 1968, Hon. Sylvester J. Ryan, U.S.D.J. dismissed all causes of action of the complaint previously filed by Fabrizio by which it sought to recover monies claimed due it by the Board arising out of work, labor and services performed and material and equipment furnished to the Board in connection with the performance of the contract referred to supra.

FORTY-NINTH: That by reason of the acts of the Board Fabrizio has sustained damages in the sum of

\$708,526.15.

AS AND FOR AN EIGHTH CAUSE OF ACTION AGAINST DEFENDANT, BOARD OF EDUCATION CENTRAL SCHOOL DISTRICT NO. 2

FIFTIETH: Plaintiff repeats and realleges each and every allegation stated and contained in paragraphs THIRTY-SECOND through FORTY-NINTH inclusive hereof with the same force and effect as though fully set forth herein.

FIFTY-FIRST: That the Board of Education is estopped from raising the applicability of Section 103 of the General Municipal Law of the State of New York by reason of its fraudulent and negligent representations to the plaintiff."

Amend paragraph 9(b) of the Pre-Trial Order by 2 adding the following:

"(6) Is plaintiff entitled to recover damages from the defendent Board of Education by reason of the claimed fraud and misrepresentation of the Board of Education in representing to the plaintiff that it was proper and legal to execute a change order simultaneously with the contract providing for the elimination of work having the value of \$171,000. from the contract documents?

(7) Is the defendant Board of Education estopped from raising the applicability of Section 103 of the General Municipal Law of the State of New York by reason of the claimed fraudulent and negligent

representations made to the plaintiff?"

Dated: New York, New York October 17, 1972

> Respectfully submitted, Leslie A. Hynes Attorney for Plaintiff

	TRANSCRIPT OF PROCEEDINGS BEFORE CARTER, J. MARCH 1, 1973 UNITED STATES DISTRICT COURT	176
	2 SOUTHERN DISTRICT OF NEW YORK	
;	3	
4	Fabrizio & Martin, Incorporated, :	2
5		
6		
7	vs.	
8	The Board of Education, Central : School District No. 2 of the Town	
9	Castle and Pound Ridge Mare	
	Associates, Inc. and Normel Construction Corporation of New	•
10	Rochelle, a joint venture,	
11	and :	•
12	Aetna Casualty & Surety Company,	
13	Defendants.	
14		
15		
16	Before:	
17	HON. ROBERT L. CARTER	
18	District Judge	
19	New York, New York	
20	March 1, 1973 - 10:15 a.m	•
21		
22	William Powers, Esq. Attorney for Plaintiff	
23	Louis E. Yavner, Esq. Attorney for Defendant, The Board of Education	
24	David A. Trager, Eag.	
25	George N. Toplitz, Esq. Attorneys for Deft Astna Casualty & Surety Comp	any.

(Messrs. Powers, Trager and Yavner opened to

MR. YAVNER: May I call my first witness, your

ROBERT F. CRANE, being first duly sworn, was

Mr. Crane, would you state your employment

I am employed by the architect of the case whose offices are in Cambridge. I am Senior Associate in the firm and at the present time I am the head of the so-called supervision department. That is the department which is responsible for administering the construction contracts after the construction contract is awarded.

In other words, you are presently head of a department that supervises the construction of a number

Some years ago in 1965, '66, '67, were you assigned by the firm to be in charge of the supervision

of the Middle School at Bedord?

- A Yes, sir.
- Q During what period of time was that?
- A That was from early in June '65 until the completion of the project.
- As a result of your firsthand experience there and also reviewing the records of the firm of which you are a member, are you familiar generally with all of the records of your firm that it has about this job?

A Yes, sir.

MR. YAVNER: I would like some advice, your Honor, on this. I have a great many exhibits. I think that the easiest way and the fastest way would be, because all of us are familiar with these documents, if I could have them marked without referring each one to the witness to be examined about each one or I can show them to him.

If the others consent, I think it would be faster to just have the stenographer mark them one after the other.

MR. POWERS: I have no idea what the documents are, your Honor. If they are just marked without being admitted --

MR. TRAGER: He just wants to mark them for

identification.

MR. YAVNER: They will ultimately be offered in evidence. If this does not save time, I will do it in the regular way.

MR. POWERS: I don't think I could at this juncture agree to them, your Honor, because there are items that I think will go to the question of damages and items of damages, as I indicated on my opening statement, that I do not feel are properly before the Court.

MR. YAVNER: I withdraw my request, your Honor.

THE COURT: What I want done -- this doesn't make any sense -- this case has been pending and scheduled for trial some time ago. Those documents that are going to be submitted by either party should have been exchanged long before this when you went through all this pretrial procedure.

MR. YAVNER: I think them is hardly a document here that Mr. Powers to not familiar with.

THE COURT: What I want accomplished is you can have those documents marked, but I am not going to delay the trial while you are studying the documents. I want all three of you to get your documents that you are going to submit in evidence in this case, during the recess and the lunch hour exchange them and each of you

eo

2

1

3

4

5

6

7

8

9

10

11 12

13

14

15

16

17

18

19

20

21

22

23

24

25

will go over them so you will know what you are going to object to and know what you will admit.

I will not have you study documents in a case like this when these matters could have been accomplished much earlier.

All right, just hand the documents to the clerk and have him mark them and we will see how we proceed. Mark them separately.

BY MR. YAVNER:

As the first few are being marked, Mr. Crane, let me ask you this: You are familiar with the basic contract for the school that was entered into between Fabrisio and the School Board?

> A Yes, sir.

To that contract was there attached a so-called change order in the amount of \$171,000, which, if you listened to the colloquy before, is the change order on the basis of which the contract was deemed to be illegal?

> A That is right.

And also attached to it was there a document, an AIA document, called General Conditions?

- Would you rephrase or restate the question? A
- What I said is was there also attached to it, it may be that that document was not physically attached,

: |

Q Is another contract document called supplemental general conditions?

but it is one of the contract documents; is that correct?

A Yes.

Yes.

MR. YAVNER: If the clerk has already marked the first few documents, would you pass them to me?

Deen marked Exhibit 1 for identification. They consist of a contract, dated March 17, 1964, between Fabrisio & Martin, as contractor, and The Board of Education, Central School District No. 2, as the owner.

"Change Order" which is in the amount of \$171,000.

Stapled to this now, but actually in its original form not stapled to it, is a document called the general conditions of the contract for the construction of buildings and attached to that, although not attached in reality, is the performance bond of Aetna Casualty & Surety Company, dated March 17, 1964, and a labor and material bond issued by Aetna Casualty & Surety Company, also dated March 17, 1964.

Finally, attached to this is a mimeographed supplemental general conditions of the contract.

1

2

3

4

6

7

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

I show these to you and ask you if these are the contract, the contract documents and the payment and performance bonds for the Middle School of Bedford School District?

A It seems to be, yes, sir.

MR. POWERS: I have no objection, your Henor, except to the extent that these are not the entire contract documents. There are other specifications and plans that are also a part of the contract and the documents here are only partial.

MR. TRAGER: May I have a voir dire on this, your Honor?

THE COURT: Sure.

VOIR DIRE EXAMINATION

BY MR. TRAGER:

Q Mr. Crane, I take it you have checked over Exhibit 1?

- A Yes, sir.
- Q These are copies, are they not?
- A Yes, sir.
- Q Do you know where the originals are?
- A No. I can assume, but I don't know for sure.
- Q Are these from your records?
- A No, sir. I think they are probably from the

Q Were you present when the contract was entered into between the Board and Fabrizio & Martin?

A No, sir.

Board's records.

- Q Were you present when the bond was furnished?
- A No, sir.

MR. TRAGER: I object to the admission of these, your Honor.

MR. YAVMER: Your Honor, first let me concede to Mr. Powers that there are specifications and that there are elaborate plans and drawings, if he wants to have them included, I will be glad to bring them down. I don't plan to ask any questions about those.

the original signed copy of the contract here. It was used as an exhibit before Judge McLean and I thought — here it is, but so far as the other documents that are attached are concerned, they are either still in Judge McLean's office or somewhere or other, but all of us have been using these documents and I would like to show to the other counsel this original copy of the contract, which also lists the contract documents.

Here are the signatures of the parties and you can compare it with the Xerox copy.

Your Honor, I would also like to say this: I have records here with me to show that Mr. Trager and his law firm have been discussing this contract and all of these documents in one lawsuit after another in the state and have attached these same documents as being the documents.

THE COURT: Mr. Trager, I am not going to tolerate any technical objections of this kind.

MR. TRAGER: You. Honor, this is not technical. This witness is not the proper witness through which this evidence should go in. He is a third party. He is not a member of the Board. He is not the clerk of the Board.

Excuse me, your Honor, but we have tried over the last year to work or get to where there is some semblance of raport and order on this whole thing and cooperate in expediting in this to bring this case to trial. We have had no cooperation from counsel on the other side.

MR. YAVNER: I want to object to that statement.

MR. TRAGER: I am sorry you take exception and this is just another instance. I have a great sense of fairness and justice and I just don't think that we are

proper witness.

it should be tried.

of these records, Mr. Yavner?

Let Mr. Yavner try his case the way he knows

THE COURT: The point is, who has supervision

being treated fairly here and I don't think he is the

2

3

4

5 6

7

9

10

11

12 13

14

15 16

17

18

19

20

22

21

23

24 25

MR. YAVHER: Your question is who had supervision of the contract?

THE COURT: Who has supervision of the records? MR. YAVMER: Supervision of the records? Mr. Fowler, who is here, had supervision of the records during the period that he was there, but Mr. Crane, who was there, and I would like to put this question to him, is the one who had the responsibility for administering the contract and all its parts. That was his job as the architect's representative.

THE COURT: The point is that if you are going to introduce records of the Board, this gentleman didn't seem to know what they were, but if you are going to introduce records, I think Mr. Trager is right, you introduce the records through the person having custody of the records and you will have no problem.

MR. YAVNER: If I may interrupt Mr. Crane to put Mr. Fowler on.

2

1

4

5

7

9

10

11

12

13 14

15

16

17

18

20

21

22 23

24

25

Q And are these the document

a copy or not. I am not point to tolerate any objection
like that. I don't mean that. I will not pay much
attention to such an objection, but certainly somebody
must be able from the Board to testify these are the records
of the Board.

MR. YAVNER: Of course. In order to save time, because Mr. Fowler will be a witness here, but let me put a different question to Mr. Crane.

BY MR. YAVNER:

Q Mr. Crane, are these contract documents, which have been marked Exhibit 1 for identification, the documents under which you operated as the architect's representative in administering the construction of this school building?

A Yes.

And are these the documents to which you referred in your discussions with the plaintiff and in your letters to the plaintiff?

A Yes.

Q Are these the documents to which the plaintiff referred in his letters and discussions with you?

A Yes.

Q And are these the documents to which the Board

Crans-direct

referred in connection with its architectural contract with you?

A Yes.

MR. YAVNER: Your Honor, I am going to offer this in evidence. If you choose not to admit this at that point, I will pass on to the other documents and have it admitted later through Mr. Fowler.

MR. TRAGER: Mr. Crane, when did you first come in to contact with this contract or when did you first have any connection with it?

THE WITNESS: I would be hard put to say when

I was first in contact with it because my position in the

firm -- I was aware of the contract, I discussed it with

other people in the office from the beginning, although

I was at the early part not personally assigned to handle

it on site, but I nevertheless was aware of the activities

of the job from the very beginning.

MR. TRAGER: When did you first go on the job?

THE WITNESS: I was assigned to handle the

job directly, as I testified before, early in July of '65.

However, I had discussed the job with other people in the

office from the very beginning, that is from the point -
by beginning in my vernacular, I mean from the time

Pabrisio & Martin were signed up to an agreement for

construction.

MR. TRAGER: That was some year and three months after the formal execution of the contract?

THE WITNESS: No, I am saying --

MR. TRAGER: July of '657

THE WITNESS: That is when I was assigned to handle the job directly. However, I was involved in the thing from the signing of the contract with Fabrizio & Martin, but at that point I was in Cambridge and dealing with other people in the firm.

MR. TRAGER: I will renew my objection to the admission of these.

THE COURT: All right. If you are going to present these documents, I think you chemid present the through the person who has had custody.

We are going to take a short recess at this point and I renew my request of you gentlemen. I want any documents that any of you are going to introduce, I want them exchanged now during this recess and the lunch hour so that if you are going to make an objection to them or you can make a determination as to whether or not you will allow them in, so that we will have your objection raised as soon as the documents are submitted.

We will take a short recess.

 MR. YAVEER: May I inquire, has counsel made any decision about the exhibit?

rather harriedly, your Bonor, and with the exception of Exhibit 1 for identification, Exhibits 2 through 14 are what appear to be copies of change unders issued to the plaintiff by the school board. I respectfully submit that these are not proper for administration as evaluation the ground that they do not involve as I stated in my opening, any issues involved in this case.

any, Aid the exhati heard custoic as a result of the illegal contract. The fact that the school board insued change orders to the plaintiff for work performed His nothing to do with the illegality of the contract.

Exhibits 15 through 23 are requistions that were subwere submitted or copies of requistions that were submitted by the plaintiff to the school board and I think
most of them have a certificate of the architect requesting
the school board to make payment or approving the requisition, the amount of the requisition.

Again, I don't see that the amount that was paid to the plaintiff for any given requisition has anything to do with the issues involved in this case.

Exhibits 24 through 40 are copies of various correspondence and telegrams. The witness, Mr. Crane, was not the author of any of these letters or a recipient of any of these letters and for that reason, without having time to read through all of them, I certainly object to their being admitted through Mr. Crane.

In addition, a number of these letters are internal. In other words, there is a letter from the architect or the effice of Mr. Harkness to Dr. Alf. Dr. Alf was the Superintendent of Schools at the time this letter was authored and the architect is the school board's representative. To that extent it is an internal letter.

A copy was not sent to the plaintiff or to the additional defendant.

THE COURT: Mr. Powers, maybe I didn't make myself clear to you. I am not by insisting that these documents be exchanged among counsel, I didn't mean by that that you couldn't make appropriate objection to the documents at the time the documents are offered.

What I meant by that was to obviate the necessity of your studying the documents before you were prepared to make whatever objection you were going to make to them so that all I really wanted to do was to get

that understood. I think as Mr. Yavner seeks to introduce these documents, you will be in a position to make any objection you want. I just don't want you and Mr. Trager to have to look at the documents and study them and pour over them and waste the time of the Court before you decide whether you are going to have an objection or not.

That is the whole purpose of doing it this way. I suggest that to everyone.

MR. POWERS: That will have to continue because we were handed 79 exhibits and some have numberous pages and I just didn't have time to get through them all.

THE COURT: I am not taking away your right to make objection to the documents. What I don't winder-stand, with all of this elaborate pretrial procedure, that these documents were not exchanged before.

MR. YAVNER: Your Monor, most of them have been.

MR. POWERS: Your Monor, that is not true.

I have copies of the examinations before trial at which questions were put about them, but even more than that, as a general comment about the overall objection, when court opened this morning I was handed a subpoena and this is the subpoena, which I should like to hand up to the

Crane-direct

Bench, which asks for everything that we have here: change orders, it asks for every memorandum, every document, every letter and it seems like a game that they are playing.

THE COURT: That doesn't mean because they ask for everything that they are necessarily going to admit that it has a right to be introduced at the trial.

MR. YAVNER: So far as I am concerned, the first objection --

THE COURT: Let's proceed. Those were objections in the abstract. You will submit your documents and then I will hear whatever objections anybody has to make.

MR. YAVNER: I take it your Honor has maled on Exhibit 1?

THE COURT: As to Exhibit 1, and I am indicating this as to all the exhibits, I don't care about the originals, but you cannot submit them unless an officer of the school board who has custody of them is on the stand and he is the one who is going to have to say they are the documents.

As to Exhibit No. 1 for identification, I am sustaining the objection to that until you get the man on the stand who had custody of the document. I will

Crane-direct

18

sustain an objection to every document you submit until that is done.

MR. POWERS: In addition, if I may, your Honor, with respect to Exhibit 2A --

THE COURT: That is not offered yet.

MR. POWERS: Part of which is in Exhibit 1 and I did not realize at the time --

THE COURT: I thought this was Exhibit 1?

MR. POWERS: You refused to admit that.

I had an additional objection based on Judge Ryan's decision with respect to the admissability of Exhibit 1 and this is an additional ground because Judge Ryan smid --

THE COURT: I am ruling it out now, Mr.

Powers.

80

MR. POWERS: All right, your Honor.

THE COURT: It is out now until we get someone on the stand who has had custody of it and then maybe you will have another objection to it, I don't know. BY MR. YAVNER:

Mr. Crane, I show you Exhibit 2-B for identification. This is headed Order for Change in Contract No. l and it is a printed heading, The Architects Collaborative. This particular one is dated August 4th.

I have here also a series of other similar

5

6

7 8

9

10

11

12

13 14

15

16

17

18

19 20

21

22 23

24

25

orders for change, some dozen of them similarly headed, and at the bottom of each of them appears the words, "Approved Board of Education, Central District No. 2, Owner. Approved The Architect's Collaborative, Architect."

Now, at the time that you were in charge of the supervision of this job, were these records in your custody?

- Yes.
- Did you have them and examine them and know their contents?
 - A Yes.
 - In behalf of the Architects Collaborative? 0
 - Yes. A
- I ask you to look at each one of them and tell me whether that answer applies to every one of these exhibits?

THE COURT: What exhibits are you submitting? You only mentioned 2-B.

MR. YAVNER: I said they were all exactly the same.

THE COURT: What are they?

MR. YAVMER: 2-B, 3, 4, 5, 6, 7, 8, 9, 10, 11,

12, 13 and 14.

MR. POWERS: If I may, your Honor, I object

to any further testimony with respect to those exhibits for identification which are dated prior to July of 1965.

Mr. Crane has previously testified that he was not in charge of this project until July of 1965.

Q Mr. Crane, at the time that you were put in charge of this project, were all these records turned over to you and were they all in your custody?

A Yes.

THE COURT: Has Mr. Crane identified all those? Has he looked at them and identified them?

MR. YAVNER: Yes. I have read off all of these to you.

Q Is your answer the same as to all of them?

THE COURT: You gave them to him to look at them and inspect. I haven't seen him inspect them.

A Yes, they are our documents and they are documents of which I had custody in our office, our copy of them.

MR. YAVNER: Thank you. I offer them in evidence, your Honor.

MR. POWERS: Objection, your Honor. Maybe

Mr. Crane can identify the documents, but I don't see

how he can testify as to the truth of the information con
tained in those documents in view of the fact that he was

not responsible for the project when I think probably most of those exhibits were supposedly issued.

I further object on the ground that these change orders have nothing to do with the issues involved in this case. They have nothing to do with the question of the legality or illegality of the contract and any damages that the school board may or may not have sustained as a result of that illegality.

In addition, these change orders were, as I understand it, issued pursuant to the contract. The contract was declared null and void, illegal by Judge McLean.

So, also, Judge Ryan in his decision stated as follows:

In sum, we hold that any claim or defense resting on the illegality of the contract is available to defendant that it may not plead breach of the prime contractor supplemental agreement or release or waive --

If they can't plead it, they can't prove it.

MR. YAVNER: Your Honor --

THE COURT: Mr. Trager, do you have any objection to these documents?

MR. TRAGER: I have coming in through this witness, your Honor. He cannot testify as to the truth

of the contents.

I object on the same basis that Mr. Powers indicated, your Honor. Anything prior to the time that he was actually on this project. He can identify them as baing in the emitedy of the Sim with which he is assembled, but as far as the context contained therein, I den't think if in appropriate or proper for them to be admitted in evidence.

content is enclosed as is. I don't think he is family with what.

The Court: All right, Mr. Yavner.

couple of more questions as to this point that was raised, but let me state as to the general-sufficient. The first thing that we have to know is her man the --

THE COUNT: I am not going to linken to that argument if well taken.

MR. YAVMER: Very well, I wen't diames the metter of relevance.

THE COURT: It merente to which a minute that Hr. Jennes is entirely might, but I as in a position where I think it is encumbent upon no to per all the feature in this case and, therefore, the issue as to whether to be

3

.

5

6

7

8

10

11

12 13

14

15

16

17

18

19 20

21

22

23

24

25

it is not a matter that I am young to decide at this point.

All right.

MR. POWERS: If I may, your Honor, may I, rather than interrupt throughout, may I have a running objection to this?

THE COURT: Yes, you may.

MR. POWERS: Thank you.

BY MR. YAVNER:

Q Mr. Crane, whether before or after July of 1965, could you tell me which of these exhibits and read their numbers are prior to July 1965?

A No. 2-B, 3, 4, 5, 6, 7, 8, 9 and 10.

Q Are the others beginning with Exhibit 11 and on -through Exhibit 14 subsequent to July or in July?

A Yes.

Q As to the first group, 2-B through 10, which are prior to July, whether before July 1965 or after, did you have occasion -- no, let me put the question more simply.

Prior to July 1965 did you have occasion as part of your work for your firm to review these documents?

A Yes.

Q What was the nature of your review of them?

Crane-direct

- A Before the change orders were prepared, these are change orders, if I am using a wrong term --
 - Q They are change orders.
- A Before these change orders were prepared, normally many of them, if not all of them, I can't recall every instance, but many of them, if not all of them, were discussed with me before they were prepared and issued to the Board and to the contractor.
 - Q Was that your role in your firm?
- A That is normally my role in my position as head of this department, yes. There may be one I didn't see, but generally I do.
- Q Do you have a recollection of having seen these change orders before they went out in final form and when they went out infinal form with the possible exception of one or two?
- A That is correct. Several of the items pop into my mind.
- Q After July 1965 did you take physical possession of the files in the architect's office relating to the job?
 - A Yes.
- Q Do those files of which you took physical possession include these change orders?

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

25

- A Yes.
- And did you then review the change orders in connection with your continuing responsibilities to supervise the job?
- A Yes, in order to be refreshed on exactly what the status of the contract was.
- Q And they remained in your custody throughout until the very end of the job?

A Yes.

MR. YAVMER: Your Honor, I offer them in evidence.

MR. POWERS: No objection.

MR. TRAGER: No objection, your Honor.

THE COURT: You mean, Mr. Powers, you have no objection other than your continuing objection?

MR. POWERS: Correct your Honor.

THE COURT: All right.

(Defendant Board of Education Exhibits 2-B, 3 through 14 received in evidence.)

MR. POWERS: Just as a point of clarification, Mr. Yavner, are you contending that those were all of the change orders or just those you want introduced?

MR. YAVMER: These are change orders that I am introducing right now.

Crane-direct

Q I show you Exhibit 1 marked for identification and ask you only this: By examining this emhibit can you tell us how much the amount of the contract was as set forth in this emhibit?

MR. POWERS: May I have a continuing objection, your Honor?

THE COURT: Yes.

A \$2,489,400.

Q Mr. Crane, from your experience in this field -by the way, I am not sure I asked you anything more than
what your occupation was and by whom you were employed.

Are you a graduate engineer?

A Yes.

Q And for how many years have you been working with architectural firms and doing this kind of work?

A 13.

Q Now, from your experience does the price set forth in an initial contract necessarily remain the contract price throughout the life of the contract?

A No. I would say very seldom.

Q What are the factors that cause the price to change?

A Directly the issuance of change orders -THE COURT: Now, I am going to exclude that kind

made the contract and I think I need to get all the facts
in, but I would certainly think that Mr. Powers is correct,
if you are going into the nature of it and how it was
changed and so forth. As a matter of feet, everyone concedes
it is an illegal contract.

I am allowing you to prove the contract and the change orders in order to get the facts of what happened in the situation, but I am going to exclude that.

MR. YAVNER: Verywell. I will start a different series of questions, but let me explain my purpose. In the pretrial order, as finally prepared, it says the contract price -- and this is the order as prepared by Mr. Trager and with my approval -- it states that the contract price is blank because he didn't have it exactly and it says the changes were blank because he didn't have that exactly.

Now, the contract price is not the amount that is set forth in the initial contract. It is these dozen change orders that change it and I want to get into the record how much each change order is so that finally we know the contract price.

THE COURT: Yes, but you have been allowed to introduce the contract and the change orders. I am not

And Exhibit 4: Is that an addition, and in what

25

	204a
	EOP Crane - direct
	amount?
	A This is an addition of three thousand dollars.
	Q And similarly with 5?
	A 5 is an addition, \$2,162.96.
	Q And 6?
8	A 6 is an increase \$7 707 40
9	
10	Do they all mean the same?
11	A An increase in the amount of the contract.
12	
13	A This was also an increase in the contract amount
14	of \$9.053.64.
15	Q 87
16	A 8 is an increase in the contract of \$3,781.
17	Q 97 A 9 is an ingress to the
18	A 9 is an increase in the contract of \$15,321.07.
19	
20	A 10 is an increase of \$144.13. Q 11?
21	
22	A 11 contains two adds and a deduct. The net effect is an increase in the contract amount of \$10,074.01.
23	Q When you say "deduct", is that a term that is
24	sometimes used for the term "credit"?
25	A I suppose one might call it a credit. The change

25

1

2

3

5

6

- Then what did you do, if you made a determination tant it was?
- Then we prepared a certificate, which was sent to the board, certifying that this was the proper amount to pay the contractor at that time.
- Were you then informed whether the board did or did not make the payment?
- We were informed. I cannot recall the exact technique on this job of how it was accomplished, but we did know whether or not the board paid, or if they deducted something from what we had certified, we were aware of that.
- Prior to the time that you took direct charge in the field of this job, were the requisitions that were submitted by the contractor, Fabrizio, reviewed by you, and did you also review or have anything to do with the preparation of the certificates issued by the firm?
- I may have reviewed some of the requisitons. I did not prepare the certificates.
 - Did you ever review them? Q
 - A The certificates?
 - Yes. Prior to the time that you took direct charge. Q
 - A No.
- After you took direct charge, did you then take over custody of all copies of the certificates and of the

he did not have anything to do with the requisitions. I may

5

6

7

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

EOP

Crane - direct

33

be mistaken, but that was my understanding of his testimony.

THE COURT: That was my understanding as well.

MR. POWERS: This requisition is Requisition Number 1, which has a date of November or somewhere around November of 1964. Mr. Crane did not take over the job until July of 1965.

MR. YAVNER: But he also testified --

THE COURT: Who issued the requisition?

Q Mr. Crane, can you answer that question?

A The requisition is generated by the contractor. It is his monthly bill for reimbursement for work performed the previous month. It is submitted through the architect.

THE COURT: The requisition comes from the plaintiff in this instance?

THE WITNESS: Yes, your Honor.

MR. POWERS: It comes from the plaintiff, as I understand, your Honor, but it is modified, on instances, by the architect's office, and my only question here with respect to the objection is the ability of Mr. Crane to say at any given time prior to July of 1965 whether or not a certain percentage of the various items of work was performed.

In other words, I question his ability to testify concerning the accuracy of the amounts sought in the requisition.

EOP

2

3

5

6

7 8

9

10

11

12

13

14

15 16

17

18

19

20

21

22

23

24

25

I don't mean to be too technical on that, but I just want --

THE COURT: He hasn't reached that point yet. If the requisitions have been submitted by your client --

MR. POWERS: Submitted by us and modified in a number of instances by the architect.

THE COURT: Then the thing, I think, we have to determine is for you to look at the requisitions and determine their accuracy. You have those in your records, and if Mr. Crane can validate them, the modifications, if there are any on them, then that raises mot . . question.

But I cannot see your objecting to a document that you submitted.

MR. POWERS. I may be premature in my objection, your Honor.

THE COURT: All right. Merely because Mr. Crane cannot or was not there, your client is the one who submitted the requisitions, as I understand it.

All right.

- Actually, Mr. Crane, weren't these requisitions received and there certifications prepared in the normal course of business of your firm?
 - Yes.
 - You not only are familiar with the normal course of Q

EOP

10

11

13

14

15

16 17

18

19

20 21

22

23

25

Crane - direct

35

business of your firm, but you also helped to direct it, did you not?

A Yes.

MR. YAVNER: I offer this Exhibit 15 for identification in evidence.

THE COURT: All right. I am going to receive it.

MR. POWERS: I have no objection.

(Defendant's Exhibit 15 for identification was received in evidence.)

MR. POWERS: Except for the continuing objection.

MR. TRAGER: I originally made the objection based on anything that he wasn't or did not personally have contact with or make. I understand that you testified that you did look at them after they came into your custody, but that was for the purpose, I take it, of whether the bottom line was correct or something like that.

Isn't that right?

THE WITNESS: Yes. I would say this again: If a specific problem came up or question came up about a particular requisition, I had it there, I could look at it, I could see what had happened before, if that was the sort of question.

MR. TRAGER: I will renew my objection.

THE COURT: It is overruled. I am receiving it.

Q I show you Exhibit 16 for identification, and are

your answers the same for this exhibit as for the previous one?

THE COURT: Is that a requisition as well?
THE WITNESS: Yes, your Honor.

Q (Continuing) Also, would you mention each time you inspect the requisition, so that Mr. Powers will know the fact, whether there has been any change of any kind made in the requisition submitted by Fabrizio.

Has there been any change in this one?

- A No.
- Q I show you Exhibit 17.

MR. POWERS: If we may, your Honor, to save time,
I think Exhibits 15 through 23 are all requisitions, running
from Requisition 1 forward to Requisition 9, or something of
that nature.

Other than my continuing objection and in view of your Honor's ruling, I have no objection to putting them in.

MR. TRAGER: Rather than get up after each one, may I object to 15-B through 23-B, on the basis of this witness, their being offered through this witness?

THE COURT: All right.

Q (Continuing) I show you Exhibit 17 for identification.

Are your answers the same as to this certification and requisition?

A Yes.

EOP

MR. YAVNER: I offer that, your Honor.

THE COURT: Go through to 22.

Q Similarly 18.

A Yes.

Q And 19?

A Yes.

Q And 20?

A 20 has some corrections made in pen, handwritten on the document as submitted.

Q Do you know what those corrections are?

A I am trying to see whether they are arithmetic corrections. Six thousand dollars was inserted, added to the amount of the requisition as it was submitted from Pabrizio & Martin to cover exterior masonry work.

How the change came to be made, I don't know. Since it is in handwriting, I assume it was made by our accounting office. I don't know how they got the information, whether it was an oversight. Pabrizio may have called us and said, "I forget to type this in on the final copy of this thing." I just don't know. But there is a change.

Q You gave Fabrizio more than Fabrizio asked for in the typewritten part of the requisition?

A Right.

1	EOP Crane - direct 38
2	MR. Y. NER: I offer this in evidence, your Honor.
3	Q 217
4	A This also has corrections in handwriting, by which
5	the amount of the requisition was reduced \$10,000 in concret
6	foundation item.
7	Q Do you know anything about that matter?
8	A No.
9	Q Was that change made in pen?
10	A Yes. There is also a rubber stamp on here,
11	"Corrected by the Architects' Collaborative".
12	Ω So it was corrected by your firm?
13	A Yes.
14	Q Was that part of the normal course of business in
15	your firm in dealing with this kind of requisition?
16	A Unfortunately, it is, yes. Many requisitions come
17	in with errors in them. We catch them in our own checking,
18	arithmetical checking primarily, but also principal checking
19	of the requisitions, and we frequently make changes in our
20	own office, in order to speed the work along rather than re-
21	turning the whole requisition to the contractor to re-type it
22	for a typographical error.
23	Q Why did you say "unfortunately"?
24	A Because it costs us money to do this.
25	Q I show you 22 and ask the same questions.

3

4

6

8

7

9

10

11

12 13

14

15 16

17

18

19

20

21 22

23

25

24

This also has handwritten changes. I cannot tell whether it is typographical or what. It refers to the same item as the previous one. It is the same \$10,000 reduction. It is referred back to previous work, not the work done in this one month.

What was the reason for the change I don't know at this time.

- Is there a similar stamp on this one? 0
- A No.

MR. YAVNER: I offer this in evidence.

THE COURT: All right.

- The last of this series, 23 for identification.
- This one has no corrections and has gone through without any correction and certified.
- This is the requisition and certification that you Q have in your files and is the normal thing you did there?

Yes.

MR. YAVNER: I offer this in evidence.

THE COURT: Are you offering all these documents in evidence?

MR. YAVNER: I offer all of them.

MR. TRAGER: Your Monor, if I could just clarify a point: I think I recall Mr. Crane saying that these payment records, fifteen or all of them, 2-B through 23-B, were in

19

20

21

22

23

24

25

A This also has handwritten changes. I cannot tell whether it is typographical or what. It refers to the same item as the previous one. It is the same \$10,000 reduction. It is referred back to previous work, not the work done in this one month.

What was the reason for the change I don't know at this time.

- Q Is there a similar stamp on this one?
- A No.

MR. YAVNER: I offer this in evidence.

THE COURT: All right.

- Q The last of this series, 23 for identification.
- A This one has no corrections and has gone through without any correction and certified.
- Q This is the requisition and certification that you have in your files and is the normal thing you did there?

A Yes.

MR. YAVNER: I offer this in evidence.

THE COURT: Are you offering all these documents in evidence?

MR. YAVNER: I offer all of them.

MR. TRAGER: Your Honor, if I could just clarify a point: I think I recall Mr. Crane saying that these payment records, fifteen or all of them, 2-B through 23-B, were in

EOP Crane - direct	20
your records. They are copies; is the	aat correct?
THE WITNESS: We have copie	
yes.	documents,
MR. TRAGER: These particul	ar ones are from the
school board?	
THE WITNESS: I assume they	must be, yes.
MR. TRAGER: Do you know who	ether they are the offi-
cial payment records on which payment	is made?
THE WITNESS: They are, yes,	because they have the
certificate signed by John C. Harkness	and an original
certificate.	
THE COURT: All right. Thos	e will be received.
MR. POWERS: No objection of	her than the standing
objection.	
(Defendant's Exhibits 16 thro	ough 23 for identifica-
tion were received in evidence.)	
THE COURT: Mr. Yavner, I pre	efer that you do your
examination at the lectern, if you want	to use it, and stay
down there, please.	
MR. YAVNER: It is immaterial	to me, whatever your
Honor wishes me to do.	
THE COURT: I want you down the	here. Stay down in
the well of the room.	

MR. POWERS: Is it all right on this side, your

Honor?

Crane - direct

40

2

4

3

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

MR. YAVNER: Your Honor, it has just been called to my attention that there is one more change order. Exhibit 14 is Change Order Number 13, and somehow stapled to it was Change Order Number 14, which should, I think, be marked as, perhaps, 14-A, now.

THE COURT: All right.

MR. YAVNER: If I may show this to Mr. Powers.

MR. POWERS: I have no objection to it, your Honor, except the standing objection, other than the fact that just for clarification, Change Order 14 was not the last change order. There are still other change orders after number 14.

THE COURT: Has 14 been admitted?

MR. POWERS: Yes.

MR. YAVNER: Yes.

THE COURT: That is an attachment to it?

MR. POWERS: 13 had been admitted, and 14 is attached erroneously to it.

MR. YAVNER: Both could have the same exhibit exhibit number, or one could be called 14-A, if it makes any difference to you.

MR. POWERS: No difference.

MR. YAVNER: If it makes no difference, then I will

1	EOP Crane - direct 42
2	MR. YAVNER: If the stenographer will please read
3	the answer given by the witness
4	(Record read.)
5	Q You said that Fabrizio submitted this amount as
6	the proper amount to cover the bond. Do you know whether
7	that was the amount that was actually paid by Fabrizio to
8	the bonding company?
9	A No; I den't.
10	MR. POWERS: I will object to the question, to this
11	extent, your Honor: that there are two bonds involved, and
12	Mr. Yavner in his question refers to the bonding company, and
13	it may well be that there are more than one bonding company.
14	In fact, there are. There are two bonding companie
15	involved.
16	
17	THE COURT: The question was asked, and Mr. Crane cannot answer it.
18	
19	Joseph Joseph Chang, Exhibit I for identification
20	to which is attached a performance bond and a payment bond.
21	Would you tell us, please, the name of the company which wrote
22	each of those bonds?
	MR. POWERS: It is conceded that Aetna Insurance
23	did.
24	MR. YAVNER: You said there were two companies.

MR. POWERS: If I may, maybe I am out of order,

2

5

6

7

8

9

10

11

12

13

14

15 16

17

18

19

20 21

22

23

24

25

your Honor, but the requisition to which Mr. Yavner referred states, "Contractor's bond, \$25,000. Subcontractor's bond, \$18,000." I believe that is it.

The contractor's bond refers to the bond that Pabrizio & Martin, the plaintiff, obtained from Aetne, the additional defendant, Aetna Casualty and Surety Company. The subcontractor's bond, for \$18,000, deals with a bond that San Marco Construction Corp., a subcontractor --

THE COURT: Who is not involved in this case, not at all. All right.

MR. YAVNER: Your Honor --

MR. POWERS: Unless Mr. Yavner wants to prove otherwise.

MR. YAVNER: I have no idea what the facts are, but this is the first time in all these years that we have been discussing this that that statement has been made. There was a bond for San Marco, which was issued, if you please, in March of 1965, and it was issued as a part of the supplemental agreement.

This is the way the first requisition came in, your Henor, and I have a right to go ahead and prove what it says. If he brings in proof later to rebut what this seems to indicate, fine.

THE COURT: The point is, you know --

MR. YAVMER: He has also, your Honor -- I have here a pre-trial order -- Is this what all three of us agreed on? All three of us agreed on this. In its first requisition, dated April 29, 1964, plaintiff billed defendant for premiums of \$25,000 for a bond and \$18,000 for a subcontractor's bond. These premiums were paid to plaintiff by defendant board on May 13, 1964.

MR. POWERS: That is not disputed, your Honor.

MR. YAVNER: I don't know what it is you are disputing. That is all I have gotten from this witness so far, and that is all I have asked him so far.

THE COURT: The issue, it seems to me, as far as
I can understand it, is that the subcontractor's bond, as I
understand vaguely the issues in this case, is not really at
iesue here. Are the subcontractors' bonds at issue here?

MR. YAVNER: Yes; they are, your Honor.

THE COURT: How is that?

MR. YAVNER: The subcontractors are going to become an important issue in several respects.

Chronologically, this very San Marco, whom Mr.

Powers mentioned, was one of the major causes for the disruption of felations in December 1964 and January 1965, so that Fabrisic walked off the job for several months. This very San Marco plays a major part. The consideration for San Marco

2

4

5

6

7 8

9

10

11

12

14

15

16 17

18

19

20

21

22 23

24

95

25

in the supplementary agreement that was entered into several months later, as a result of which Fabrizio came back on the job.

THE COURT: Why haven't you joined them as a thirdparty defendant?

MR. YAVNER: That is exactly what I am coming to.

In addition to that, our pre-trial order has a lengthy discussion, and so does the pre-trial memorandum a short discussion, of three prime contractors and two subcontractors who have instituted suits in the State Court against the Board of Education on the basis of Fabrizio's delays, thus causing them damage.

We have interpleaded the bonding company, which in some of the instances has been able to get out of it on more or less technical grounds. We have asked the bonding company to waive the citizenship problem and permit these companies to come in and be joined in this proceeding so that we can settle all of the issues arising out of Fabrizio's delay.

The bonding company has refused to agree to that.

THE COURT: What has that got to do with the issues ere? The issue I want to know in this case --

MR. YAVNER: We are being sued --

THE COURT: Would you let me finish, Mr. Yavner?

The issue that I have asked you to address yourself

Crane - direct

EOP

3

2

6

7 8

9

10

11 12

13

14

15

16

17

18

19

20 21

22 23

24

25

to is that if you have a subcontractor bond that you want to plead in this case, why haven't you interpleaded the subcontractor? He is not a party here.

MR. YAVNER: I am not permitted to interplead him under the Federal Rules, because there is no diversity of citizenship.

THE COURT: Then if there is no diversity of citizenship and you cannot interplead him, how is the Court going to have any jurisdiction over a party that isnot here?

MR. YAVNER: I think that it does -- What the Court has here is the jurisdiction to take equitable consideration of what has been happening and who has damaged whom in what respects.

Here we have been damaged -- and this is the largest part of our damage -- by these other prime contractors. There is \$139,000 in total for the three primes and \$124,000, I think, for the two subs, and their damages occur solely because of the delays that this contractor caused us.

Now, this is a contingent liability, and we have had EBTs in the State proceeding --

THE COURT: I am sorry. I am not going to allow anything about the subcontractors' bend. If you are going to show that there were some delays that were caused you by this party, then you show it. But the business of the bond against

Crane - direct

the subcontractor --

MR. YAVNER: Your Honor --

I am going to allow you to show any damages that come to you by virtue of what the plaintiff has done in this case and any manner in which the plaintiff has done it, whether it was caused by other parties or not — or not whether it was caused by other parties but any damage the plaintiff's delay has caused the school board. Those damages you will be able to show. But the question of a bond of some other — of that other party, who is not before us, I am not allowing.

Let's proceed.

MR. YAVNER: Your Honor, I accept your ruling, although I would like an opportunity in this proceeding, after more evidence comes in, to raise the subject again. Right now, all I know is that attached to the contract are two bonds. One is called performance bond; the other, payment bond. On Requisition 1 there is a statement about so much money for performance bond, so much money for subcontractor's bond, and only from Mr. Powers and only today for the first time have I heard that that second bond is for a San Marco Company.

I have always assumed that it was in payment of the two bonds that the contract required them to supply.

-

THE COURT: I can't help you on that.

MR. YAVNER: All I am trying to do --

THE COURT: I canot help you on that.

MR. YAVNER: Your Honor, all that I have done is tried to show that there is this entry about two bonds in two different amounts --

THE COURT: I gather there is no objection about the \$25,000 bond and that there is some objection about the introduction of evidence as to the \$18,000 bond. Is that correct?

MR. POWERS: That is correct, your Honor. That is correct. There is no question about the \$25,000 bond. Mr. Yavner's client prepared the contract breakdown, and if they don't know what the subcontractor's bond is, that is not our problem. He has to prove that those moneys --

THE COURT: Mr. Trager?

MR. TRAGER: Your Honor, for the sake of brevity, we did agree in the pre-trial order that there was X number of dollars paid for a bond and \$18,000 for a subcontractor's bond to the plaintiff, meaning to Fabrizio & Martin, and this was paid; these premiums were paid to the plaintiff by the board on May 13, 1964.

That is exactly what we are willing to agree.

THE COURT: All right.

7 8

MR. TRAGER: We giso agree that Actna Casualty
founished a payment and pessermance bond. However, what I
would like to state is -- and I differ with Mr. Yavner -that the bonds were not attached, and I think if you will
check these exhibits, they were not attached to the contract.

MR. The bonds were not attached to the contract. They accompanied it on the same day, but they were not physically attached.

THE COURT: All right, Mr. Yavner. You have a stipulation on the record in regard to this proceeding. Let us go on.

BY MR. YAVNER: (Continuing)

Q Mr. Crane, do you know what the contract or the general conditions or the specifications say about the kind of bonds that the contractor is supposed to furnish?

A He is supposed to furnish to the owner a performance bond and a payment bond. The performance bond guarantees completion of the contract; the payment bond guaranteeing payment to subcontractors.

O To your knowledge, is there anything in the contract or the general conditions or the specifications that provides that the Board of Education is to pay Fabrizio for any kind of bond other than a performance bond or payment bond?

1	EOP Crane - direct 50
2	A No.
3	Q There is no such provision?
4	A Not that I know of.
5	Q Do you know
6	MR. POWERS: I will object to that, your Honor, in
7	the sense that the witness obviously has not checked anything
8	so he is just testifying from memory.
9	THE WITNESS: I have read the general conditions,
10	and I don't recall anything in the general conditions which
11	required payment of any bonds except the performance and the
12	payment bonds, if that is the question.
13	
14	THE COURT: What are we getting at here now, Mr.
14	Yavner?
15	MR. YAVNER: I think what we are getting at is
16	that Fabrizio billed us for \$18,000 that he had no right to
17	bill us for. On these requisitions he may bill only for
18	those items that are called for by the contract.
19	THE COURT: Obviously, you cannot now show that by
20	Mr. Crane, because he doesn't know.
21	Let's proceed.
22	Q Let me show you, Mr. Crane
23	THE COURT: You put someone on who does know.
24	MR. YAVNER: I want to show him the general condi-
25	tions.

Ď.

EOP

Crane - direct

THE COURT: Mr. Crane doesn't know.

Mr. Crane, would you examine these documents and tell us where it appears that there are any provisions about bonds?

MR. POWERS: Your Honor, again I have to object, because he is not giving the witness the entire contract documents.

THE COURT: That objection is sustained.

Why don't we take our luncheon recess now?

We will recess now for lunch until two o'clock.

(A luncheon recess was taken.)

T 1 pm

3

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

MP 1

AFTERNOON SESSION

2:00 p.m.

ROBERT F. CRANE, resumed:

DIRECT EXAMINATION (Continued)

BY MR. YAVNER:

Q During the luncheon recess, Mr. Crane, did you examine the contract documents, including the basic contract, the general conditions, supplementary general conditions, specifications and any other contract documents in order to ascertain what provisions there were about bonds?

A Yes; I did.

MR. YAVNER: I would like to have this marked for identification, your Honor.

(Defendant's Exhibit 81 marked for identification.)

- Q Mr. Crane, I show you Defendant's Exhibit 1 for identification and 81 for identification. Together, do these represent the contract documents with the exception of the plans?
 - A Yes; they do.
 - Q What references have you found --

MR. YAVNER: Excuse me. May I now have Exhibit 81 marked in evidence, please?

MR. POWERS: If I may, your Honor, I would like to see what this is.

ì

THE COURT: Is that the right number for that exhibit?

MR. YAVNER: I realize that this should not have been 81 for identification. I was using the number that was put on there.

MR. POWERS: If I may have a voir dire on this, please, your Honor, very brief --

THE COURT: Before you go into the voir dire, let me ask Mr. Yavner:

I have indicated that I am going to allow you to introduce the facts surrounding this controversy. Now, since it is clear that it has been decided and is therefore the law of this case that the contract is illegal, the only purpose that I had in mind in having you introduce the matter earlier was so we could have a starting point for a consideration of the issues in this case.

The issues, as I understand them to be in this case, are now that you are counterclaiming on two grounds: one, because the contract was illegal, and you therefore claim back the two million dollars or so that you have already spent, and, number two, you are claiming back whatever damages, whatever added costs you had to incur by virtue of the various derelictions that you allege the defendant to have — or rather the plaintiff to have committed.

4 5

æ

7 8

Now, for the life of me, I can't see -- these are the issues as I have framed them. If it is conceded, as it must be, that the original contract, in whatever amount, whatever services were to be performed, for the life of me I can't see the mecessity of burdening the Court and burdening the record with a great many documents going to the existence of the contract when we all know and we all concede, as we must, that it is illegal.

So that I have difficulty, before Mr. Powers gets into that, in understanding why you need to go any further than Exhibit 1 in regard to giving me a frame of reference on which to handle this case and introduce those other documents.

I would like you to address yourself to that. If I am convinced that I am incorrect, then you will be able to proceed.

MR. YAVNER: My understanding of what Judge Ryan and the Court of Appeals said was that we were not barred from talking about the contract. What we were barred from was merely saying that something was provided in the contract, we were entitled to it, but we could use anything at all, including the contract, to serve as a measure of damages.

In connection with the bond payments, we paid out money for bond premiums. It has been our belief that the money was used for certaimpurposes, particularly to pay Aetna

Insurance Company its premiums on the payment and performance bonds. Astna has claimed that it has done nothing; it is responsible for nothing and is trying to get away from the effect of the Court of Appeals decision. It has accepted premiums.

Now, perhaps the fact that it has accepted one premium is sufficient on which to base a determination, somewhat as the Court of Appeals did. I just think that it is stronger to show that it accepted two premiums.

In any event, it was represented to us by this contractor that he had taken money for a particular purpose. He was not permitted to take it for any other purpose. If it now appears that he took it for a different purpose, I think that I have the right to show that, if only to demonstrate his lack of good faith and that he stole money, in effect, from the Board of Education.

were any of the conditions or provisions pursuant to which the Board made money and so forth, I suppose if you want to show that, if it is not going to be stipulated, I suppose it is necessary. What I cannot see is that all you want that document in for is to prove that Aetna accepted various payments for various things, and I don't see why you are putting a document in that is some 300 or 400 pages. What do you need that for?

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE FOLEY SQUARE, NEW YORK, N.Y. CO 7-4580

7 8

MR. YAVNER: That document happens to contain the bid, the advertisement -- is it the bid advertisement? -- which is a one or two page thing, but it is the only document I have that contains that one sheet of paper.

THE COURT: Then what you are introducing it for is to have in just the sheet of paper. Introduce the sheet of paper.

MR. YAVNER: Then I have no use for the rest of the document at this time.

THE COURT: You didn't make that clear to anybody.

MR. POWERS: First of all, I would like to object to Mr. Yavner testifying as to the conditions under which the contractor may have received payments and his conclusory statements that the contractor may have collected funds under false pretenses.

IfMr. Yavner can produce testimony to this effect, fine, but I certainly don't think that these statements should be coming out of his mouth as statements of fact and not as contentions, and to that extent I do object strenuously.

THE COURT: I guess I am in part responsible for that because I addressed my remarks tohim and he was merely answering them, but remember we don't have a jury here.

is producing one page of the specifications I do not

object, other than the continuing objection.

THE COURT: All right.

Crane - direct

MR. POWERS: To the extent then that Mr. Yavner

2 3

4 5

6

7

9

10

11

12

13 14

15

16

17

18

19

20

21

22 23

24

25

Mr. Crane, I show you page B-T of the volume marked specifications. This page is headed "advertisement for bidders." Does this page contain a reference to the bond requirements?

A Yes, it does.

Would you read that reference to the Court, please?

It says: "The successful bidder will be required to furnish satisfactory performance and labor and material payment bonds in the amount of the contract price."

Is there any other reference on that pages to 2 bonds?

A No.

MR. YAVNER: I offer this page in evidence, your Honor.

THE WITNESS: This is page B-1 -- excuse me, there's another page, apparently this is a Section- B-1. There doesn't seemto be apage number. It is the first page of the advertisement for bidders.

MR. YAVBER: Let the record show that Exhibit

	Crane - direct 58
2	81 for identification is withdrawn.
3	(Defendant's Exhibit 81 was received in
4	evidence.)
5	O Do you have Exhibit 1?
6	A Yes, I do.
7	O In Exhibit 1, examine Article 30.
8	MR. POWERS: Are those the general conditions
9	which are part of 1?
10	MR. YAVNER: Yes.
11	THE WITNESS: Kouse me, did you ask me to read
12	Article 307
13	MR. YAVNER: Turn to it. You don't have to read
14	it.
15	What reference does it make to bonds, if any?
16	A It makes a general reference to the fact that
17	the owner has the right prior to the signing of the
18	contract to require the contractor to furnish bond covering
19	faithful performance of the contract in payment of all
20	obligations arising thereunder.
21	In any of the other contract documents are there
22	any references to bonds?
23	A No.
24	Q Mr. Crane, I show you Exhibit 50 for identi-
25	fication. Exhibit 50 consists of a number of pages stapled

together, some letters signed by the Superintendent of

3

1

2

3

4

5

6

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

Would you identify, please, the particular ones that are signed by you?

MR. YAVNER: Excuse To any the particular ones.

MR. YAVNER: Excuse me, your Honor, I am just wondering whether -- because I don't want to waste time arguing about the ability to get something in -- whether this Exhibit 50 can then be split up and we will mark these particular pages as exhibits. That is my intention.

O Would you show us the --

Schools, some signed by you.

THE COURT: Mr. Yavner, this is your case, and you try it.

MR. POWERS: I willobject, anyway, your Honor, to that portion of the exhibit which has no relationship to Mr. Crane.

THE COURT: He wants to split it up.

MR. YAVNER: I am not offering it as an exhibit in evidence except for his letters.

- A How do you want me to identify it?
- ? Turn to the first one and give me the date.
- A This letter is signed by --
- O No, your letters.
- A One of November 16, 1965 --
- Q Just a minute. This is a Xerox copy of a letter,

Crane - direct

2

3

4

5

6

7

9

10

11

12

13

14

15

16

17

18

19

20

21

22

21

24

25

but is that your signature?

Yes.

And this is a letter of yours addressed to the Board of Education?

A Yes.

MR. YAVNER: I offer it in evidence, and show it to my adversaries.

MR. POWERS: Objection, your Honor. This refers to the corract or a supplement to the contract, and to that extent I think it is completely immaterial to the issues of this case.

MR. YAVNER: Your Honor, this is a letter dated November 16, 1965. It is one of the early events that led to the final walksway from the job by this contractor, and the termination of his contract, which led then to the necessity for a completion contract.

What I am now doing is introducing documents through this witness signed by him which indicate the problems that developed as a result of which this contract was terminated.

MR. POWERS: If I may, this just leads to a morass or problems as far as I can see. No. 1, what Mr. Yavner is referring to is a statement made by Mr. Crane based on a supplemental agreement that was entered into in

Crane -direct

approximately March of 1965, which was a year after the contract, roughly a year after the contract's work started. In that supplemental agreement the Board of Education with the architect maneuvered in such a way that they forced --

MR. YAVNER: I'm sorry, what did you say?

MR. POWERS: -- maneuvered in the negotiations in such a way as to place time restrictions on when various buildings were required to be completed, as I mentioned in the opening. I think there were five buildings in all: Three academic buildings, a central building and a gymnasium.

agreement, and the date contained in that supplemental agreement as to when one of the buildings was required to be furnished. There was no provision in the original contract with respect to completion of the various parts of the work. It just came up in the supplemental agreement, and the School Board demanded it as part of the supplemental agreement.

I don't particularly know the purpose for it being offered, but it does specifically relate to that supplemental agreement, and it has no validity in the absence of the supplemental agreement, and to that extent I think it is completely irrelevant.

evidence?

THE COURT: Is the supplemental agreement in

3

1

2

3

4

5

6

7 8

9

10

11

12

13

14

15

16

17

18

20

21

22 23

24

25

MR. POWERS: It has been marked, but that is not in evidence, but that is a technical objection because eventually it will come in. I am not objecting on that ground, your Honor. Even if Mr. Yavner did submit the supplemental agreement to be introduced in evidence I would object to its introduction for the same reason as I have been keeping my continuous objections, but here he is basing facts on that supplemental agreement which I think is going far

MR. YAVNER: It doesn't at all. What we have to get down to is the fact he walked off the job and another contractor took his place, and this cost us money. What I am trying to do is show the Court that there were reasons for his contract being terminated and that he was unjustified in just stopping work and walking way from the job.

afield from this litigation and is going to create a great

extension of trial time as far as I can see.

THE COURT: As you stated it, I would allow that in evidence, but it doesn't seem to accord with Mr. Powers' objections. I don't know where we stand here.

MR. YAVNER: I think his objection is a wrong objection.

THE COURT: I don't think that at all. I think

his objection is correct if that document, or any documents that you have, are going to unduly extend the parameters of this hearing.

The hearing, it seems to me -- and I keep saying this -- the hearing, it seems to me, and what you are entitled to show, are those facts which by virtus of the plaintiff's action you were caused damage. What you have just told me is that they walked off the job and were unjustified in doing so. I certainly think that is a part of it. But to get into various kinds of supplemental agreements and requirements and such stuff like that doesn't seem to me to be pertinent to the issues involved.

MR. YAVNER: Your Honor, I have been constrained because of the objections made and because I haven't wanted to spend a lot of time qualifying him, and because I had arranged for him to come down today from Boston, but I could interrupt him and put in these other documents, but if I may spend a minute and tell you the significance that would also waste time.

May I have Mr. Crane excused for one minute and have Mr. Fowler take the stand so I can question him about the supplemental agreement?

MR. POWERS: Your Honor, here again if Mr. Yavner wants to put the supplemental agreement into evidence let

him do it. I willobject; based on what your Honor said earlier you will admit it in evidence with my continuing objection. I am not disputing what is contained in the supplemental agreement.

THE COURT: I understand.

MR. POWERS: I don't know what the purpose of putting Mr. Fowler on the stand would be.

MR. YAVNER: I just thought you were going to be objecting to my putting it in through Bob Crane.

MR. POWERS: No.

THE COURT: That is not the objection.

MR. YAVNER: If you want argument on the merits of the supplmental agreement, I will have to tell you what it is.

THE COURT: That is not the objection that is being made. The objection, in my -- let's see if I can put it so you can understand me. It seems rather difficult, but let's see if I can.

I think that you are entitled to show any acts of this plaintiff that caused damage to you by his unjustifiable conduct, and so forth. That seems to me to be a part of the equitable considerations that have to be condidered in determining this case.

Now, the basic contract that we have, I have allowed

Crane - direct

that in, as I indicated earlier, merely in order for us to have a starting point so I can understand what the amount was involved and basically how it got started.

But these other matters that you are now about to produce, which don't go to the conduct of the defendant, seems to me to certainly can't prove, you are not going to be able to sustain damages that occurred merely because the defendant didn't keep to a contract that is illegal or a supplemental agreement that is illegal. That's what Judge Wyatt held, as far as I understand him, and that's what I understand the law to be.

But you can, it seems to me, show the way in which you were damaged by some acts on the part, or mis-feasance or malfeasance on the part of the plaintiff in this case, and that's what you should address yourself to.

MR. YAVNER: Your Honor, the supplemental agreement, I think, is one of the most important events that we have in the entire history of this case because Fabrizio, the plaintiff, had walked off the job, the Board had brought in his bonding company, the Board was adament in getting rid of him and terminating him then and cuttingits losses, and would have been able to cut its losses.

THE COURT: What you need to do on that is prove that. You don't prove it merely by showing me a supplemental

3

4

5

6

7 8

it?

9

10

11

12

14

15

16

17

18

19 20

21

23

22

24

25

agreement. Get the facts out from some witnesses. You don't need the supplmental agreement in that regard.

MR. YAVNER: Unfortunately, I have the wrong witness on for that particular point, and--

THE COURT: I'm sorry, that's your problem, isn't

MR. YAVNER: Then I will reserve this and come back to the supplemental agreement later today or tomorrow, but I do want to continue as much as we can since Mr. Crane has to go back to Boston.

Do you have to go back tonight?

THE WITNESS: I would certainly like that.

MR. YANNER: Then that means you don't have to.

MR. TOPLITZ: Your Honor, may I approach the bench? I have the decision of Judge Ryan. We keep referring to it, and it is part of the record on appeal, and I wanted to show it to your Honor.

THE COURT: I have the decision, and I have read

BY MR. YAVNER:

it.

O Mr. Crane, let me direct your attention to a point in time. Do you recall that several weeks before Pabrizio left the job the second and last time that you attended a meeting with Pabrizio, his attorney, and me, and Mr. Fowler,

Crane - direct 67/68

too?

MD 16

- A Yes.
- O Do you remember where that meeting was held?
- A In your office.
- Would you tell the Court the subject of discussion that evening during that meeting?

A The discussion of pending extra work performed by the contractor and the preparation of change orders to incorporate those extra pieces of work into the contract.

•	ш

1

3

4 5

6

8

9

7

10

11

12

13

14

15

16 17

18

19

20

21

22

23

25

24

MP 1 Crane - direct

Was Fabrisio there because he was complaining about 0 anything?

He had been complaining for some time about the A slow processing of his claims for extra cost.

Q What was he complaining about?

Well, he was alleging that it was taking the board, the owner and the architect too long to prepare and execute change orders, so that he in turn and his subcontractors could bill for those items of work on their requisitions.

Mr. Crane, somewhere in these two envelopes you have Q exhibits that were used by Mr. Powers in your deposition, which describe that meeting and list the various things. I think it was Exhibit 9. Could you find it, please?

A Exhibit 9.

You have it? All right.

A Yes.

Q May I see it, please?

What does it represent? What does this document represent?

This is a -- If I may try to talk in my own A language --

No. Give me a general description. Label it. I want to --

It's a spread of claims of extra work done and not A

IP 2 Crane - direct

70

yet incorporated into legal changes to the contract.

Q And when did you prepare that document?

A A few days before the meeting in your office that we just mentioned. I brought it to that meeting to serve as a sort of agenda.

MR. TOPLITS: Excuse me. When was that meeting? Was the date mentioned?

THE COURT: No.

MR. YAVNER: No. The date was not mentioned.

THE WITNESS: It was, I think, early in February

O It was approximately in February?

A There may be a date on that thing there, Lou, on that piece of paper. '66; excuse me.

THE COURT: Mr. Powers and Mr. Trager, he is offering this in evidence. Do you have any objections?

MR. POWERS: No. I question some of the factualness, but I will do that on cross-examination. I have no objection to the exhibit.

THE COURT: All right.

MR. POWERS: I should qualify that, your Honor. I have my standing objection.

(Defendant's Exhibit 82 for identification was received in evidence.)

Crane - direct

5

1

2

3

4

6

8

7

9

10

11 12

13

14

15 16

17

18

19

20 21

22

23

24 25

THE COURT: Mr. Yavner, let us proceed with the trial, please.

Mr. Crane, isn't it a fact that Mr. Fabrizio was writing letters to the Board of Education making complaints about the architect and alleging that you were not giving prompt attention to matters with which he was concerned?

MR. TRAGER: Your Honor, I object to the form of the question.

THE COURT: It is a good objection.

MR. YAVNER: I withdraw the question.

Mr. Crane, please tell us what items you have down Q here and how they relate to Mr. Fabrizio.

This sheet is set up with three groups of items for which there was a claim for an increase in the Fabrizio contract. The first group of 1 through 13, I have a little sub-script of "C". The "C" is for Crane. They came out of my list of items that were pending for settlement and preparation of a change order.

The next group is labeled "F". That group is taken from a document, a letterhead submitted by Fabrizio and Martin, on which he tabulated his understanding of outstanding items to be incorporated in change orders.

The third group are marked with a prefix "X" and also categorized with an "F" for Fabrizio, because he had

divided his into two groups. The reason for making this

spread in anticipation of a meeting at Mr. Yavner's office

was because of duplication back and forth between the three

lists of items. Even within Pabrizio's own claims there were instances where he listed the same item of work twice with separate claims, and I did it this way so first of all we could cull out the duplications; then, at the meeting we went on to discuss these items and to try to come to some conclusion at that meeting, either to agree that they would be put into a change order or that additional information was needed, or some such dispensation of the claims.

There are a whole series of notes here, one by one, of what it was agreed at that meeting to do at that point in connection with these claims.

Q Did you explain to Mr. Fabrizio and to his attorney what his actual status was of each one of these claims or complaints?

A Yes. Each one in turn was openly discussed in this meeting.

- Q According to --
- A But then Mr. Fabrizio and his attorney knew all about what the status was in each case.
- According to your schedule, were any of those items which represented, if I understood you correctly, a summary of

1

3

5

6

9

10

11 12

13

14

15

16

17

18

19

20

21 22

23

24

25

where you couldn't make any firm decision one way or the other?

Well, there were those that had to do with the price. There was also -- I don't have the letter -- Yes; I do. There were five that were felt to be -- on Patronne 20th, which was after this meeting, I wrote to Fabrisio, since we had not heard from him in regard to the items on which he was supposed to furnish additional documentation, and in trying to summarize all the items that had to be on the table at that meeting, I said, "Of the remaining items, Numbers 1-F, 2-F, 3-F, 4-F and 5-F have been withdrawn by common comment or preliminary discussion by attorneys for Fabrisio & Martin and the school board. The rest is still being checked by our office."

There were these five items at which it was felt at the meeting required legal interpretation and therefore really beyond my scope.

Excuse me. You have just been referring to a letter that you say you wrote to Mr. Fabrizio.

A Yes.

MR. YAVNER: May I have that? I am going to offer this into evidence.

MR. TRAGER: Is it in evidence yet?

MR. YAVNER: NO.

1	MP 7 Crane - direct
2	MR. POWERS: No objection.
3	Q Would you say that this was approximately a week
4	or two weeks after the meeting at my office?
5	A My recollection is, about two weeks.
6	Q And what happened after sending this letter?
7	A Excuse me, Mr. Yavner; The date of the meeting is
8	set forth in the letter. It says, "Referring to the meeting
9	in Mr. Yavner's office of February 1, 1966."
10	Q So it was approximately twenty-eight days later
11	A Three weeks Four weeks.
12	Q What happened after this letter was sent? Did you
13	get a reply?
14	A No. I am sure we did not.
15	Q Did you get a telephone call?
16	A Not that I can recall, no.
17	Q What action did Mr. Fabrizio take in the several
18	days after February 28th?
19	A He stopped work at the job.
20	Q Can you tell us about that in a bit more detail?
21	A As nearly as I can recall the exact sequence of
2	events, I received a phone call in Cambridge, I believe, on
23	a Monday morning, early in March I don't know what day
A	of the week that was, but I think it was on a Monday morning,

March 4th or 3rd or somewhere like that -- from Mr. Beardsley.

25

MP 8 Crane - direct

Mr. Beardsley was the owner's on-site representative. Mr. Beardsley told me that Fabrizio & Martin's forces had failed to report for work that morning. He understood from gossip that they were stopping work on the job. That certainly seemed to be the case, because there was no one there from Pabrizio at all. The other prime contractors were on site and were at work.

- Q What happened after that?
- A I packed my bags and went down to Mt. Kisco, that same day, as I recall it. This would obviously be a serious matter.
- Q Tell me what happened in relation to the job. Did Fabrizio come back? What steps did you take?
 - A Fabrizio --
- MR. POWERS: I think there are two questions involved there, your Honor.
 - MR. YAVNER: I withdraw the second question.
 - Q Did Fabrizio come back to the job?
 - A No; he did not.
 - Q What steps did you take?
- A We waited until the proper time had elapsed. I believe it was seven days -- in which the contractor is supposed to perform, before the owner may invoke a claim of a break of contract. After that time had elapsed, we advised

All right. So the \$25,000 liquidated

MP 9

Crane - direct

the owner -- and counsel went along with our recommendation -- that Fabrizio be declared in default.

By that action we also, in accordance with the terms of the general conditions, assumed control of all of the materials and equipment that was on the job. Prom then on, we went through the period of preparing documents for getting a new contractor on the job.

Also, because Fabrizio had walked off the job so precipitately, some of the buildings or parts of the buildings were subject to damage from the weather. An obvious case was the roof of one of the buildings. I think it was the central building. The roof had not been fully completed but had been started. I think the glazing of windows in the central buildings was also a part of that concern.

In any event, there were two or three areas where Mr. Beardsley and I were concerned for the sefety of the buildings themselves. We discussed this with the board and talked to the subcontractors involved, the roofer and the glazier. We persuaded them to continue working on the job even though Fabrizio appeared to be in breach of his contract and was not at that time working.

As a matter of fact, Fabrizio had sent a letter to all of his sub-contractors telling them that he had stopped work on the job.

19

20

21

22

23

24

25

MP 10 Crane - direct

Excuse me

Q

78

Q Did you know that the Superintendent of Schools was sending letters in connection with this stoppage to the bonding company, to Fabrizio and to others?

MR. POWERS: Objection.

If T

THE COURT: Sustained.

Q Were copies of any letter sent by the Superintendent of Schools in connection with this matter sent to you?

A I am sure they were. I don't have them in my possession, but I remember discussing the problem with the Superintendent of Schools and participating in a decision to try to get the bonding company to react.

- Q To your knowledge, did the bonding company come in?
- A What do you mean by "come in"?
- Q Did it undertake to perform the work under the bonds?
 - A No.
 - Q What did you do then, after that?

A I was involved in the general survey of the existing state of the work and the preparation of bid documents
to enable the board to go out for a bid to get a new contractor in to finish the work of general construction on the
site.

Q Can you tell us what procedure you followed in letting a completion contract?

MP 11

Crane - direct

3

2

5

6

isn't it?

7

8

10

11

12

13 14

15

16

17

18

19

20

22

21

23

24 25 MR. POWERS: I will object to this, your Honor, under the guidelines of my general objection. I don't think it is relevant.

THE COURT: I think the question is superfluous,

MR. YAVNER: You mean, as to the procedure?

THE COURT: The procedure has nothing to do with the issues, does it? They went and got another contractor to finish the job. Why do we have to go through the procedures?

MR. YAVNER: the only relevance of the procedure is that we followed one which was insured to cut any damages to the bone. It was, I believe, a very good procedure, and I wanted to bring out that it did. It minimized all damages. It mitigated damages.

THE COURT: If the plaintiff is going to show that you didn't, then you bring that in. They haven't raised any questions about that yet.

- Q To whom was the completion contract let?
- A To a joint venture, Mars Association, Inc., Normel Construction Co., Inc, I think it was, referred to as Mars-Normel.
 - Q Was that as a result of competitive bidding?
 - A Yes, sir.

Crane - direct
Do you recall the amount of their contract price?
No; I don't.
And did you then supervise the completion of the
Yes.
How long did it take to complete it?
A Until the fall of 1966, approximately six
after the new contract was let.
And did the original prime contractors other than
continue on with Mars-Normel?
Yes.
Mr. Crane, I have here a group of additional re-
ons with certifications, which supplement the group
nich you testified this morning. These begin with
1965 and continue on to February 16, 1966.
MR. YAVNER: Your Honor, to save time, I am suggest-
I repeat the same questions I did this morning, and
han spend time on each one of these individual ones.
tification numbers run from 66 to 78.
THE COURT: What were those exhibits?
MR. YAVNER: Identification Number 66 to 78.
THE COURT: Show them to counsel.
MR. POWERS: No objection.
THE COURT: Have any of those documents been seen

MP

Crane - direct

by the defendant --

MR. YAVNER: I don't know what Mr. Trager has seen. Mr. Powers has conducted depositions.

MR. TOPLITZ: Your Honor, we were made an additional defendant without any discovery or anything, back in January of last year, '72, and we have not had any discovery, because we were automatically placed on the calendar, because this case was on the calendar. So, many of these documents we are seeing for the first time.

of this session tonight, I want you to furnish the defendants with all the documents that you are going to produce tomorrow. I want that done so they don't have to spend time looking over them. We are trying this case as though we had three or four weeks to try it.

MR. YAVNER: I will be delighted to do that, your Honor, and I shall.

MR. POWERS: Your Honor, I was under the impression from what Mr. Yavner said that they were all requisitions.

There is one item, 76, which is not a requisition. It is a check, a canceled check.

MR. YAVNER: It's in place of the document that -MR. POWERS: Unless you can describe to me what it
is in place of, I will coject to the document, and I therefore

MP 14

2

3

4

5

7

9

10

12

13

14 15

16

17

18

20

21

23

24

25

Crane - direct

amend my statement based on my lack of knowledge that there was this exhibit.

THE COURT: You did describe them as requisitions. That is what I understood.

Mr. Crane, I show you Identification Number 76, which is a canceled check in the amount of \$6,450, made by the Central School District to the order of Pabrizio and Martin. It is dated January 12, 1966 and was deposited by the drawee on January 18th.

Do you know what this check represents?

A You had a requisition for February of 1966 by Fabrizio. I was just wondering if this is the amount of the requisition. It's a pretty low amount, but --

Q January 13th, you have one for \$142,000.

THE COURT: Mr. Yavner, would you get those exhibits and let's have them identified. When we adjourn tonight, get your papers together so we can come prepared to try this case tomorrow.

A I don't know what the check is for, Mr. Yavner.

MR. YAVNER: Then I withdraw that exhibit. There is no objection to these others.

MR. TRAGER: No.

MR. YAVNER: then may we have each of them marked in evidence.

1

3

4

6

7 8

9

10

12

13 14

15

16

17

18

20

21

22

24

25

MR. POWERS: As I think I said, your Honor, I have my standing objection as to relevancy.

MR. YAVNER: Your Honor, I have no further questions for this witness. The gentlemen may inquire.

CROSS-EXAMINATION BY MR. POWERS:

Now, Mr. Crane, do you know whether any change orders were issued that were not introduced in evidence by Mr. Yavner?

A There were two or three change orders that were in the process of being processed at the time that Fabrizio & Martin stopped work at the job. They were at various stages. A change order has three or four steps, and it takes a little while. It could easily take a month to complete the cycle on executing a change order.

Q The last change order is identified as Change Order 14. Weren't there in effect sixteen change orders?

A I think that the last change order number I think actually was 17, although 17 I think had just been prepared by our office and had not gone to the owner or the contractor.

O Do you have copies of change orders 15, 16 and 17?

A Well, I don't in my hands, but they must be around, yes.

MR. YAVNER: We have 15 and 16 but not a 17.

THE WITNESS: Well, my memory may be faulty.

Maybe 16 was the last one. Somehow, I think there was a 17, but it may have been in the very early stage of production.

Q Well, I show you what appears to be Change Orders 15 and 16, with documents annexed to them, and ask you if you can identify them, please.

(Defendant's Exhibits 66 through 78, inclusive, received in evidence.)

A Well, Number 15 is the next one in sequence. It is a change order for an increase in contract, signed by John C. Harkness of our office and Vincent Fabrizio of the contractor's office, apparently not executed by the school board.

This is one of the cases I was describing, where apparently the thing was in transit. It has to be signed by us, by the contractor and the school board. This requires mailing back and forth, together with the time of typing it up and getting people available to sign, and this sometimes takes as much as a month to go through the process and finally become executed and a legal part of the contract.

- Q What is the date on there, please?
- A The date of preparation is January 20, '66.
- Q January 20th. So as of the time Fabrizio left the job, some time in March, that still had not been approved

And the total of Change Order 16?

Q

1	MP Crane - cross
2	A It's an add of \$1,078.18.
3	Q So it's a combination of roughly \$20,000?
4	A \$20,000, yes.
5	MR. POWERS: I ask that these be marked in evidence
6	please.
7	(Plaintiff's Exhibits 1 and 2 for identification
8	were received in evidence.)
9	Q Now, Mr. Crane, do you know when the work was
10	performed for Change Order 15, which has been marked as
11	Plaintiff's Exhibit 2?
12	A It's my recollection that all of that work was per-
13	formed by Mars-Normel, none of it by Pabrizio & Martin, to
14	the best of my knowledge.
15	Q Do you recall when the first request for a change
16	order was made with respect to that work?
17	A That is a long history. My guess is that the first
18	request was prior to July, when I got on the job.
19	Q Yes. And no decision was made by the school board;
20	is that right?
21	A No decision was made.
22	Q Or the architect, from that time
23	A No; it was under discussion, but
24	Q Up until January of 1966?
25	A That's right. It was a possible change in the

1	MP Crane - cross 89
2	Q Do you have a copy of the Requisition 22?
3	A Yes; right here.
4	Q And this is for work that was performed in February?
5	A No. January. Let me see the date on For the
6	month of February. Excuse me. This one is for work performed
7	in February.
8	Q Yes. Was there any action taken by the architect
9	with respect to the processing of that requisition?
10	A It was reviewed, and the figures were changed in
11	our office because of some inconsistency with previous requi-
12	sitions. However, you can't tell from this whether the cer-
13	tificate was There is no certificate here. It does have
14	a note, "Okay March 4, 1966, RFC", which would indicate that
15	I would that I had approved it to our accounting office
16	for a check of the arithmetic and preparation of a certifi-
17	cate.
18	There is also a note on it: "Not paid as of March
19	18, 1966".
20	Q The initials RFC
21	A RFC. Robert F. Crane.
22	Q So you approved it as of March 4, 1966?
23	A That's right.
24	Q But the requested payment was not made?
25	A It's my recollection that the board did not pay

MP

2

3

4

5 6

7

8

9

10 11

12

13

14 15

16

17

18

19

20

21

22 23

24

25

Crane - cross

90

it, but, there again, that comes after my action with my firm.

And by this requisition, the contractor requested \$66,200 and some-odd; is that correct?

His typed request was -- Well, it's somewhat confused.

Well, is there not typed in \$66,000 and some-odd, which is crossed out?

2/21/66. That's correct. There was also typed in under "Present Request" a total of \$45,385, which is quite different from this.

I take it from your figures that you recognize the \$66,000 figure, because that is the figure you used from which to deduct certain items?

Well, the plaintiff's request is inconsistent, in that he has different sums of money in two separate columns.

Well, which figure did you use?

We used the \$4 ,049.66, which was the figure carried under his present request, subject to a hand correction. This \$40,385 over here now balances with this figure over here after the deduction of liquidated damages to be withheld. At this point, the board was withholding apparently \$25,375 accumulated liquidated damages to that point.

I think there was a bond --

25

A

24

25

A

Q And in some of these items, the contractor had

That's correct, yes.

93

	270a
1	NP Crane - cross 94
2	alrezdy performed the work?
3	A In some of them, yes.
4	Q In some of them, correct. But he couldnot get
5	paid until there was a change order; correct?
6	A Correct; right.
7	Q And some of these items resulted in a
8	MR. POWERS: Strike that, if you will, please.
9	Q Some of these items became part of Change Order
10	16; isn't that correct?
11	A Yes; that's correct.
12	Q And it took this meeting between the attorneys
13	and the architect and the contractor in order to get these
14	items paid?
15	A Correct. In order to get them put into a change
16	order.
17	Q To get them resolved into a change order?
18	A Correct.
19	Q You say in some of these, some of the items dealt
20	with interpretation of the contract, and all of those items
21	go back to 1964?
22	A That's correct.
23	Q Now, take for example the master mechanic. That
24	claim was submitted in July of 1964; isn't that correct?
25	A That claim, according to my knowledge, was July 12

outside and bought some at his own expense; that's what you

A 201 Affidavit of Service by Mail

LUTZ APPELLATE PRINTERS, INC.

U.S. COURTOF APPEALS:SECOND CIRCUIT

FABRIZIO + MARTIN

Appellants,
against
BOARD OF EDUCKTION,
Appellus.

Index No.

SS.:

74-1661

Affidavit of Service by Mail

STATE OF MEW YORK, COUNTY OF NEW YORK

I, Laurel N. Huggins,

being duly sworn.

deposes and says that deponent is not a party to the action, is over 18 years of age and resides at

1050 Carroll Place, Bronx, New York

That upon the 29th day of July 1974, deponent served the annexed Appellants

A ppendit

attorney(s) for

Re Appellee

in this action, at *

the address designated by said attorney(s) for that purpose by depositing a true copy of same, enclosed in a postpaid properly addressed wrapper in a Post Office Official Depository under the exclusive care and custody of the United States Post Office Department, within the State of New York.

Sworn to before me, this day of July

29th 19 74

ROBERT T. BRIN

NOTARY PUBLIC. STATE OF NEW YORK LAUREL N. HUGGINS

QUALIFIED IN NEW YORK COUNTY COMMISSION EXPIRES MARCH 30, 1975

* Max E. Greenberg, Trayman, Harris, Cantor, Reiss & Blasky-Attorneys for Applellee-100 Church St., New York.

Weinstein, Krulewitz & Weiner, P.C.-Attorneys for Appellee-144 Golden Hill St., Bridgeport, Conneticut 06604.